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CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

AND BY THE

RAILWAY AND CANAL COMMISSION.

GROCOCK *v.* GROCOCK.

1919
May 14, 15.

Justices—Case stated by Metropolitan Magistrate—Power to sign after ceasing to hold Office—Husband and Wife—Order for Maintenance—Enforcement of Payment of Arrears—Discretion of Justices—Time for taking Summary Proceedings—Retrospective Effect of Legislation—Summary Jurisdiction Act, 1848 (11 *&* 12 *Vict. c.* 43), *s.* 11—*Bastardy Laws Amendment Act,* 1872 (35 *&* 36 *Vict. c.* 65), *s.* 4—*Summary Jurisdiction Act,* 1879 (42 *&* 43 *Vict. c.* 49), *s.* 54—*Interpretation Act,* 1889 (52 *&* 53 *Vict. c.* 63), *s.* 38, *sub-s.* 2—*Summary Jurisdiction* (*Married Women*) *Act,* 1895 (58 *&* 59 *Vict. c.* 39), *s.* 9—*Criminal Justice Administration Act,* 1914 (4 *&* 5 *Geo.* 5, *c.* 58), *s.* 30, *sub-s.* 3; *s.* 32, *sub-s.* 1.

A metropolitan magistrate sitting as a Court of summary jurisdiction heard and determined an information. The magistrate subsequently stated a case for the opinion of the King's Bench Division. At the time he signed the case he had ceased to hold office:—

Held, that as his signature merely certified that he had done certain things and decided certain matters while he was a magistrate, the case was stated according to law.

By s. 4 of the Summary Jurisdiction (Married Women) Act, 1895,

1919

GROCOCK
v.
GROCOCK.

any married woman whose husband has deserted her may apply to a Court of summary jurisdiction acting within the city, borough, petty sessional or other division or district in which the cause of complaint has arisen, for an order under the Act. By s. 5 the Court to which application is made may make an order containing (*c*) a provision that the husband shall pay such weekly sum not exceeding two pounds as the Court shall consider reasonable.

By s. 7 a Court of summary jurisdiction acting within the city, borough, petty sessional or other division or district in which any order under the Act has been made may, on the application of the married woman or of her husband and upon cause being shown upon fresh evidence, alter or discharge the order.

By s. 8 all applications under the Act are to be made in accordance with the Summary Jurisdiction Acts. By s. 9 the payment of any sum of money directed to be paid by any order under the Act may be enforced in the same manner as the payment of money is enforced under an order of affiliation; that is to say, under s. 4 of the Bastardy Laws Amendment Act, 1872, by distress, and in default of sufficient distress by warrant of committal to gaol for the term therein specified unless the sum due under the order of affiliation with costs be sooner paid. By the Summary Jurisdiction Act, 1879, s. 54, that Act is to apply to the levying of sums adjudged to be paid under an order enforceable as an order of affiliation, and to the imprisonment of a defendant for non-payment of such sums as if an order so enforceable were a conviction on information. The Act is to be construed as one with the Summary Jurisdiction Act, 1848. By s. 11 of the last-named Act, in all cases where no time is specified for making or laying a complaint or information in the Act relating to the particular case, the complaint is to be made and the information laid within six calender months from the time when the matter of the complaint or information arose.

By s. 30, sub-s. 3, of the Criminal Justice Administration Act, 1914 (which came into force on December 1, 1914): "Any order made either before or after the commencement of this Act by a Court of summary jurisdiction for the periodical payment of money may, upon cause being shown upon fresh evidence to the satisfaction of the Court, be revoked, revived, or varied by a subsequent order."

By s. 32, sub-s. 1, of the Act of 1914: "It is hereby declared that, notwithstanding anything in s. 54 of the Summary Jurisdiction Act, 1879, the provisions of s. 11 of the Summary Jurisdiction Act, 1848 (which relate to the time within which summary proceedings are to be taken), do not apply to proceedings for enforcing the payment of sums adjudged to be paid by an order in any matter of bastardy or by an order enforceable as an order of affiliation."

By s. 38, sub-s. 2, of the Interpretation Act, 1889: "Where . . . . any Act . . . . repeals any other enactment, then, unless the contrary intention appears, the repeal shall not . . . . affect any right, privilege, obligation, or liability acquired, accrued, or incurred under any enactment so repealed."

The appellant and respondent were husband and wife. In January, 1912, on the application of the respondent, the Sheffield City justices made an order, under ss. 4 and 5 of the Summary Jurisdiction (Married

Women) Act, 1895, by which it was adjudged that the appellant had since October, 1911, deserted the respondent, and it was ordered (inter alia) that he should pay to the respondent 15*s.* a week and 29*s.* 6*d.* for costs. The appellant paid to the respondent 30*s.* only under the order, being two weeks' maintenance. In November, 1918, the respondent preferred an information before a metropolitan magistrate under s. 9 of the Summary Jurisdiction (Married Women) Act, 1895, and s. 4 of the Bastardy Laws Amendment Act, 1872, claiming from the appellant all the arrears due under the order of January, 1912. The information was heard and determined by the magistrate in January, 1919, when the appellant was ordered by the magistrate to pay to the respondent the whole amount of the arrears and four guineas costs.

Although the magistrate was of opinion that, in the particular circumstances of the case, if he had a discretion he would not make an order for the full amount of the arrears due, he was also of opinion that he had no discretion, but was bound to make an order for the payment of the whole amount of the arrears.

Held, (1.) (following the judgment of Grove J. in *Davies* v. *Evans* (1882) 9 Q. B. D. 238) that s. 4 of the Bastardy Laws Amendment Act, 1872, gave the magistrate a discretion as to whether he would or would not make the order; (2.) that the magistrate's discretion was limited to making or not making the order for the payment of the whole, and he had no discretion to order the payment of a portion of the arrears; (3.) that s. 32, sub-s. 1, of the Criminal Justice Administration Act, 1914, was not retrospective, and as that Act came into operation on December 1, 1914, s. 11 of the Summary Jurisdiction Act, 1848, prevented the magistrate from ordering payment of the arrears which became due before June 1, 1914.

CASE stated by a metropolitan magistrate, who, at the date of the proceedings before him, was the magistrate at the West London Police Court.

On January 13, 1919, the magistrate made an order for payment of arrears of maintenance to a wife, and on the same day application was made to him to state a special case.

When the magistrate signed the case (April 12, 1919), he had ceased to hold office, having been gazetted out in March, 1919.

Wickham for the respondent. There is a preliminary objection to the hearing of this appeal. The magistrate, at the time he signed the case, on April 12, 1919, had ceased to hold office as a magistrate, having been gazetted out in March, 1919, and therefore had no power to state a case for the opinion of the Court. The case ought to have been stated by his successor, or by some other magistrate following the procedure laid down in s. 12 of the Supreme Court of Judicature Act, 1881 (44 & 45 Vict. c. 68), which provides that "during any vacancy in the office of any judge of the High Court of Justice to whom any cause or matter may have been . . . . specially assigned, it shall be lawful for any other judge of the said Court, who may consent so to do, to hear and dispose of any application for an injunction or other interlocutory order . . . . in the place of the judge whose office may have so become vacant." Sect. 37 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), provides that "a warrant or summons issued by a justice of the peace . . . . shall not be avoided by reason of the justice who signed the same dying or ceasing to hold office," but there is no similar provision with reference to a case stated.

Cecil Whiteley for the appellant. Under r. 18 of the Summary Jurisdiction Rules, 1886, an application to a Court of summary jurisdiction under s. 33 of the Summary Jurisdiction Act, 1879, to state a special case has to be made within seven days from the date of the proceedings to be questioned, and the case has to be stated within three months from the date of the application. All those conditions were complied with. The fact that the magistrate had ceased to hold office at the date when he signed the special case is immaterial. The signature merely identifies the document. The magistrate merely put into writing that which he agreed to do when the application was made to him on January 13, when he was a magistrate. If the preliminary objection were sound the result would be that if a magistrate refused to state a special case and then resigned he could not state a case even though ordered by the High Court to do so.

DARLING J. We think this objection cannot prevail. The magistrate heard the information, was asked to state a case, and agreed to do so while he was a magistrate. He had full cognizance of the matter. All he had to do was to state the case in writing, and, for all we know, he may have done that during the time he was a magistrate. If that be so, all he had to do when he had ceased to be a magistrate was to sign the case. That merely certified that he had done certain things and decided certain matters while he was a magistrate.

The case stated by the magistrate was (omitting formal parts) as follows :—

On January 13, 1919, an information preferred on November 4, 1918, by the respondent, Adelaide Grocock, against the appellant, her husband, under s. 9 of the Summary Jurisdiction (Married Women) Act, 1895, and s. 4 of the Bastardy Laws Amendment Act, 1872, alleging that a sum of 209*l.* 4*s.* 6*d.* was due to the respondent from the appellant for arrears under an order made on January 9, 1912, by a Court of summary jurisdiction sitting at Sheffield under ss. 4 and 5 of the Summary Jurisdiction (Married Women) Act, 1895, whereby it was ordered (inter alia) that the appellant should pay to the respondent the weekly sum of 15*s.* and the sum of 29*s.* 6*d.* for costs, was heard and determined by the magistrate sitting as a Court of summary jurisdiction, and upon the hearing the appellant was ordered by the magistrate to pay to the respondent the said sum of 209*l.* 4*s.* 6*d.* and four guineas costs.

Upon the hearing of the information the following facts were admitted or proved:

The appellant and respondent were husband and wife, and had three children living, all of whom were under the age of sixteen years. On January 9, 1912, on the application of the respondent, the Sheffield City justices made an order under ss. 4 and 5 of the Summary Jurisdiction (Married Women) Act, 1895, whereby it was adjudged that the appellant had since the month of October, 1911, deserted the respondent, and it was ordered that the legal custody of the three children of the marriage between the appellant and the respondent while under the age of sixteen years be committed to the respondent, and that the appellant should pay to the respondent thenceforth the weekly sum of 15*s.*, which sum the Court, having regard to the means both of the appellant and the respondent, considered reasonable, and it was also ordered that the appellant should forthwith pay the sum of 29*s.* 6*d.* for costs.

The appellant paid to the respondent under the order the sum of 30*s.*, being the sum due by him to her for two weeks' maintenance. Before the date of the third week's payment the respondent left the three children in the custody of the appellant, and removed to London, leaving no address with the appellant where communications or payments could be sent to her, or where any inquiry could be made as to her mode or manner of living. The appellant was then, and still is, residing in Birmingham, and from the date when the three children were left in his custody by the respondent up to the present time they had resided with him and he had supported them.

On November 4, 1918, the information was preferred before the magistrate by the respondent against the appellant under s. 9 of the Summary Jurisdiction (Married Women) Act, 1895, and s. 4 of the Bastardy Laws Amendment Act, 1872, for the enforcement of the payment of the sum of 209*l.* 4*s.* 6*d.*, being the arrears due of the sums of money directed to be paid by the order of January 9, 1912, of the Sheffield justices. Until the service of the summons granted by the magistrate on the information of November 4, 1918, and dated November 4, 1918, the appellant had not, since early in 1912, had any communication with the respondent, nor had he known her address. No application for payment had been made to the appellant by the respondent and no previous proceedings had been taken by, or on behalf of, the respondent to enforce the arrears under the order of January 9, 1912.

It was contended on behalf of the respondent that by virtue of s. 32 of the Criminal Justice Administration Act, 1914, she was entitled to recover the whole of the arrears of maintenance under the order of January 9, 1912.

It was contended on behalf of the appellant (*a*) that s. 32 of the Criminal Justice Administration Act, 1914, which came into operation on December 1, 1914, was not retrospective and did not give the respondent the power to enforce the arrears due before June 1, 1914, this date being a period of six months before the passing of the Criminal Justice Administration Act, 1914; (*b*) that, the appellant having maintained the three children to the benefit of the respondent from January, 1912, to the date of these proceedings, the cost of their maintenance should at least be deducted from any amount ordered by the magistrate to be paid by the appellant to the respondent; and (*c*) that the magistrate was entitled to take into consideration what had happened since the making of the order of January 9, 1912, and that the enforcement by the magistrate under s. 9 of the Summary Jurisdiction (Married Women) Act, 1895, and s. 4 of the Bastardy Laws Amendment Act, 1872, of the payment of the sums due under the order of January 9, 1912, was discretionary. *Davies* v. *Evans* (1) was cited in support of this contention.

Although the magistrate was of opinion that under the particular circumstances of this case if he had a discretion he should not make an order for the full amount of the arrears due, he was also of opinion that he had no discretion but was bound to make an order for the payment of the whole amount, and he therefore made an order for payment and ordered the appellant to pay to the respondent the said sum of 209*l.* 4*s.* 6*d.* with 4*l.* 4*s.* costs, and in the event of failure to recover by warrant of distress, fourteen days' imprisonment in default.

The questions for the opinion of the Court were whether the magistrate was right in holding (1.) that s. 32 of the Criminal Justice Administration Act, 1914, is retrospective, and (2.) that the enforcement by the magistrate under the Acts of 1895 and 1872 of the payment of the sums due under the order of January 9, 1912, was not discretionary.

Cecil Whiteley for the appellant. Under s. 5 of the Summary Jurisdiction (Married Women) Act, 1895, a Court of summary jurisdiction may make an order containing a provision that a married woman be no longer bound to cohabit with her husband, and also a provision that the husband shall pay to the applicant such weekly sum as the Court shall consider reasonable. Under s. 7 the Court which made the order may vary or discharge it, but there is no provision that any other

(1) 9 Q. B. D. 238.

Court may do so. Sect. 9 provides that "the payment of any sum of money directed to be paid by any order under this Act may be enforced in the same manner as the payment of money is enforced under an order of affiliation." Sect. 4 of the Bastardy Laws Amendment Act, 1872, provides that in case the putative father neglect or refuse to make payment of the sums due from him under the order of the justices for the maintenance and education of the bastard child, the "justices may, by warrant under their hands and seals, direct the sum so appearing to be due . . . . to be recovered by distress." The justices have a discretion whether they will enforce payment of sums due under the order. It was so held by Grove J. in *Davies* v. *Evans* (1), although Huddleston B. in the same case held that the word "may" should be read "must," and that therefore the justices are bound to enforce payment of the sums due. The word "shall" is used in the section where it was intended that the justices should have no discretion. The justices "shall" hear the evidence of the woman, and "shall" also hear the evidence of the putative father. The language of the section is afterwards changed to "may." If it had been intended that the justices should have no discretion in the matter the word "shall" would have been used in the section instead of the word "may." It is clear that the Legislature assumed that the justices had a discretion whether or not they would make an order, because by s. 37, sub-s. 2, of the Criminal Justice Administration Act, 1914, an appeal is for the first time given to a Court of quarter sessions from an order made by a Court of summary jurisdiction relating to bastardy. There would be no use in giving a right of appeal if the justices have no discretion whether or not they should make an order for the payment of arrears. The magistrate has full discretion in dealing with the matter; he may make an order for the payment of the full amount of the arrears, or an order for payment of the arrears for a limited number of weeks, or he may decline to make an order at all. Lush J. in *Stacey* v. *Lintell* (2) considered that the justices had a discretion

(1) 9 Q. B. D. 238. (2) (1878) 4 Q. B. D. 291.

to allow an order for the maintenance of a bastard child to continue until the child had reached the prescribed age.

In any event, payment of the arrears cannot be ordered beyond June 1, 1914, for the Criminal Justice Administration Act, 1914, is not retrospective. It was held in *Matthews* v. *Matthews* (1) that the limit of six months imposed by s. 11 of the Summary Jurisdiction Act, 1848, applies to an order for payment of a weekly sum under s. 4 of the Summary Jurisdiction (Married Women) Act, 1895, so that an order could not be made for payment of more than six months' arrears. Sect. 32, sub-s. 1, of the Criminal Justice Administration Act, 1914, provided that the provisions of s. 11 of the Act of 1848 should not apply to proceedings for enforcing the payment of sums adjudged to be paid by an order enforceable as an order of affiliation. Sect. 44 of the Act of 1914 provides that it shall come into operation on December 1, 1914. Up to that date payment of six months' arrears only could be enforced. The effect of s. 32 was to abolish the limitation of six months with regard to arrears accruing subsequent to December 1, 1914; but it did not have a retrospective effect so to enable arrears for any length of period to be recovered after December 1, 1914. In the absence of an expressed intention that a statute shall have a retrospective operation, the rule is nova constitutio futuris formam imponere debet non præteritis: *Moon* v. *Durden*. (2) Further, the Interpretation Act, 1889, provides by s. 38, sub-s. 2, that "where . . . . any Act . . . . repeals any other enactment, then, unless the contrary intention appears, the repeal shall not . . . . affect any right, privilege, obligation, or liability acquired, accrued, or incurred under any enactment so repealed." There is no express provision in the Criminal Justice Administration Act, 1914, that the statute is to have a retrospective operation, and therefore the magistrate could not make an order for payment of arrears which were due before June 1, 1914.

Wickham for the respondent. In s. 9 of the Summary Jurisdiction (Married Women) Act, 1895, which enacts that

(1) [1912] 3 K. B. 91.

(2) (1848) 2 Ex. 22.

"the payment of any sum of money directed to be paid by any order under this Act may be enforced in the same manner as the payment of money is enforced under an order of affiliation," the word "may" is a word indicating compulsion and is equivalent to "shall," because it is an enabling word employed to effectuate a legal right: *Julius* v. *Bishop of Oxford.* (1) In s. 32, sub-s. 1, of the Criminal Justice Administration Act, 1914, the words "do not" mean "never did." The section was enacted in order to overrule the decision in *Matthews* v. *Matthews* (2) that only six calendar months' arrears were recoverable, and the magistrate had, therefore, full power to award the payment of all the arrears. [The Affiliation Orders Act, 1914 (4 & 5 Geo. 5, c. 6), s. 6, was also referred to.]

DARLING J., having stated the facts, continued: In those circumstances the magistrate had to consider the matter in the light of s. 4 of the Bastardy Laws Amendment Act, 1872, which is made applicable to the proceedings before him by s. 9 of the Summary Jurisdiction (Married Women) Act, 1895. Two questions arise: first, whether the magistrate was bound to make the order which was asked for by the respondent, or whether he had a discretion; secondly, whether if he made an order he was bound to make it for the full amount, in compliance with the order of the Sheffield justices, or whether he could order payment of something less. The case states that before the magistrate it was contended that by virtue of s. 32, sub-s. 1, of the Criminal Justice Administration Act, 1914, the respondent was entitled to recover the whole of the arrears of maintenance under the order of January 9, 1912. That puts very plainly the question on which the opinion of this Court is desired, and with regard to the contention that s. 32, sub-s. 1, of the Act of 1914 is retrospective I am of opinion that it is not. Before the Act of 1914 was passed the law was that only six months of the arrears of maintenance could have been recovered. By s. 32, sub-s. 1, of the Act of 1914 it was declared that the provisions

(1) (1880) 5 App. Cas. 214.

(2) [1912] 3 K. B. 91.

of s. 11 of the Summary Jurisdiction Act, 1848, "do not apply" to proceedings for enforcing the payment of sums adjudged to be paid by an order enforceable as an order of affiliation, and in my opinion the words "do not apply" mean "do not apply from the present moment when this Act is passed." The section contains nothing to show that the provisions of s. 11 of the Act of 1848 are not to apply in respect of the period antecedent to the passing of the Act of 1914. It would be most unusual to make such an enactment retrospective, and the words of s. 38, sub-s. 2, of the Interpretation Act, 1889, seem to me to make it plain that the Legislature intended s. 32, sub-s. 1, of the Act of 1914 to be prospective and not retrospective.

A further contention on behalf of the appellant was that the magistrate had a discretion given him by s. 4 of the Bastardy Laws Amendment Act, 1872, either to make or not to make the order for the payment of these arrears. The magistrate came to the conclusion that s. 4 of the Act of 1872 is imperative and that he had no power to do anything but make the order. He was of opinion that he had the authority of *Davies* v. *Evans* (1) in support of that view. In that case the Court (Huddleston B. and Grove J.) were divided in opinion, and therefore the appeal was dismissed, because it is a rule that where the Court is equally divided the appeal fails. Now this Court has to consider *Davies* v. *Evans* (1), and decide which judgment was right. Grove J. held that s. 4 of the Act of 1872 gave the justices a discretion as to whether they should make an order for the enforcement of the payment of the arrears due under the original order. His reason for so holding was that the word "shall" hear the evidence is used in the earlier part of the section and the word "may" in the later part, and that reason appears to me to be satisfactory. I think, therefore, that the judgment of Grove J. was right, and that the section gives the justices a discretion as to whether they will or will not make an order enforcing payment of the arrears due under the original order.

The magistrate, while holding that he had no discretion,

(1) 9 Q. B. D. 238.

was of opinion that if he had had a discretion he would not have made an order for payment of the full amount of the arrears, and it has been contended before us that the magistrate has not only a discretion as to whether he will or will not make an order for payment of the whole of the arrears claimed, but also a further discretion as to whether he will order only a part of the arrears to be paid. I do not think that the magistrate has that further discretion. His discretion is, in my view, limited to making or not making an order for the payment of the whole of the arrears, and it seems to me that this view is strengthened by the fact that the original order can be reviewed by virtue of s. 7 of the Summary Jurisdiction (Married Women) Act, 1895. In the case of bastardy the matter did not stand on the same footing, but now by s. 30, sub-s. 3, of the Criminal Justice Administration Act, 1914, "Any order made either before or after the commencement of this Act by a Court of summary jurisdiction for the periodical payment of money may, upon cause being shown upon fresh evidence to the satisfaction of the Court, be revoked, revived, or varied by a subsequent order." Under that provision the appellant could have applied to have the original order varied, and if he had succeeded on the application the arrears enforceable would only have been those due under the original order as varied. The words of s. 30, sub-s. 3, are "any order made either before or after the commencement of this Act," so that, apparently, it would still be open to the appellant (subject to any provision as to a time limit) to apply to have the original order varied, and then the magistrate could exercise his discretion as to whether he would or would not order payment of the arrears due under the order so varied.

The only other point is whether there was any power to make an order for payment of arrears which became due before June 1, 1914. That depends on whether s. 32, sub-s. 1, of the Act of 1914 is retrospective or not. In my opinion, as I have already said, it is not retrospective, and therefore it follows that as the Act came into operation on December 1, 1914, there was no power to make an order for the payment of arrears which became due before June 1, 1914. The case must be remitted to the magistrate now sitting in the court in which it was previously heard, in order that he may deal with it in accordance with the views of this Court.

Avory J. I am of the same opinion. Two questions of law arise. First, whether s. 32, sub-s. 1, of the Criminal Justice Administration Act, 1914, is retrospective; and secondly, whether the enforcement by the magistrate of payment of the arrears due was or was not discretionary.

After the judgment of Darling J., with which I agree, it is sufficient for me to say that the answer to the question whether the enforcement of the payment of the arrears is discretionary is to be found in the judgment of Grove J. in *Davies* v. *Evans*. (1) I approve that judgment, and am of opinion that it was correct, and that the judgment of Huddleston B. was not correct. The reasons given by Grove J. for holding that the word "may" in s. 4 of the Act of 1872 is not imperative, but permissive, were forcible, if not conclusive. It is sufficient to cite the following passage from his judgment: "In numerous cases the enforcement of the order might be productive of great hardship. Suppose the order were wrongly made, and the putative father were not the real father of the child, and the mother were an abandoned woman, yet the order would stand; are the justices in such case, although the mother has a husband able and ready to support the child, and although if all the facts had been before them they would have made a different order, bound for thirteen years to enforce the order? I think that they are not." I agree with the view expressed in that passage; and, in my opinion, the magistrate had a discretion.

Then comes the question to what extent had the magistrate a discretion in enforcing the order? Apart from s. 32, sub-s. 1, of the Act of 1914, the question is whether he has a discretion merely to say that he will or will not order payment of the arrears, or whether he has the larger discretion to say that he will order payment of a portion but not the whole. I agree that the magistrate has no discretion to say that he will order payment of a portion of the arrears, and, subject to the provision in s. 32, sub-s. 1, his only discretion is to say either that the whole amount is to be paid or that no portion of it is to be paid.

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(1) 9 Q. B. D. 238, 242.

As to s. 32, sub-s. 1, I agree that the effect of that section and of s. 38, sub-s. 2, of the Interpretation Act, 1889, is to limit the right of the respondent to the recovery of arrears which have become due since June 1, 1914, i.e., during a period commencing six months before the coming into operation of the Act of 1914. It is true that in a sense s. 32, sub-s. 1, relates to procedure only, because it repeals s. 11 of the Summary Jurisdiction Act, 1848, so far as it applies to these proceedings, and that section is one imposing a time limit of six months. But while in a sense s. 32, sub-s. 1, relates to procedure, yet if it were construed in the sense contended for by the respondent it would also alter rights, because at the date when the Act of 1914 was passed a person from whom arrears were claimed was entitled to say that by law he was liable only for arrears due six months before the date of the complaint. That was decided in *Matthews* v. *Matthews*. (1) Therefore, if the Act were construed as the respondent desires, the effect would be to alter the liability of the person sued, and to alter the rights of the complainant. Consequently, s. 32, sub-s. 1, is not a mere provision as to procedure, and statutes which alter rights or create liabilities are never held to be retrospective unless they contain express words to that effect. Therefore s. 32, sub-s. 1, is not retrospective in the sense contended for by the respondent, and consequently the magistrate's jurisdiction was limited to the amount of arrears that have accrued since June 1, 1914.

SALTER J. I am of the same opinion. The first question is whether the magistrate had a discretion to enforce the original order and, if so, what were the limits of that discretion. That depends on the construction of s. 4 of Bastardy Laws Amendment Act, 1872, which gives justices the power to make and enforce a bastardy order. Portions of that section are clearly imperative, and portions, beyond doubt, dis-

(1) [1912] 3 K. B. 91.

cretionary. The question is whether the part with which we are now concerned is imperative or discretionary. It is imperative that the justices hear the woman's, and the alleged father's, evidence, but they have a discretion as to whether they adjudge the child's paternity and as to whether they make an order or not. With regard to enforcement of the order, the justices may issue a distress warrant, and may imprison the father or hold him to bail pending the result of a levy, and if no sufficient distress is disclosed they may, if they think fit, commit the father to prison for three months. It is clear that the powers to commit, and to enforce, the order are discretionary. The justices have a discretion as to whether they will make an order and as to whether they will enforce it. I therefore agree with the judgment of Grove J. in *Davies* v. *Evans*.(1) But the justices have no discretion enabling them to enforce the order partially, nor is there anything in the judgment of Grove J. to support that contention. They must either enforce it as it stands or not at all.

The other question is what is the extent of the respondent's rights if the magistrate thinks fit to enforce the the order. That depends on the construction of s. 32, sub-s. 1, of the Criminal Justice Administration Act, 1914. That sub-section is a partial repeal of s. 54 of the Summary Jurisdiction Act, 1879, and s. 11 of the Summary Jurisdiction Act, 1848, and must be construed as though the words "do not apply" were "shall not apply after this Act comes into force." If it were construed as the respondent asks us to construe it, it would impose on many persons obligations from which they had been relieved by lapse of time. Therefore the right to recover arrears under this order does not go back beyond June 1, 1914.

Appeal allowed.

Case remitted.

Solicitors for appellant: *W. H. Pitman, for Chambers and Sons, Sheffield.*

Solicitors for respondent: *W. Gipps, Kent & Son.*

J. E. A.

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(1) 9 Q. B. D. 238.

1919
July 21.

MOSELEY, Appellant *v.* DIRECTOR OF PUBLIC PROSECUTIONS, Respondent.

Justices—Practice—Indictable Offence dealt with summarily—Plea of Guilty—Right of Appeal to Quarter Sessions—Metropolitan Police Courts Act, 1839 (2 *&* 3 *Vict. c.* 71), *s.* 50—*Summary Jurisdiction Act,* 1879 (42 *&* 43 *Vict. c.* 49), *ss.* 12, 19.

Where a person is charged before a metropolitan police magistrate with an indictable offence which is dealt with by the magistrate under the powers conferred by s. 13 of the Summary Jurisdiction Act, 1879, by a sentence of imprisonment without the option of a fine upon a plea of guilty, the person so summarily convicted has no right of appeal except that which is given by that Act, the right of appeal given by s. 50 of the Metropolitan Police Courts Act, 1839, not being available in such a case; and inasmuch as it is a condition of the right of appeal under s. 19 of the Act of 1879 that the person convicted did not plead guilty, a person who has been summarily convicted and sentenced to imprisonment under s. 13 of the Act of 1879 upon a plea of guilty has no right of appeal at all.

Case stated by quarter sessions for the county of London.

On February 1, 1919, the appellant, Frederick John Moseley, was charged at the West London police court before one of the metropolitan police magistrates with stealing certain articles of the value of 120*l.*, the property of his masters, Waring & Gillow, Ld.

The charge against the appellant was dealt with by the magistrate in accordance with the provisions of s. 13 of the Summary Jurisdiction Act, 1879. (1) The appellant pleaded guilty and was sentenced to six months' imprisonment in the second division. Against this sentence the appellant appealed.

At the hearing of the appeal before the Court of quarter sessions on April 7, 1919, it was contended on behalf of the respondent that the appellant, having been dealt with under s. 13 of the Summary Jurisdiction Act, 1879 (1), possessed no right of appeal. This contention was based on the provisions of ss. 19 and 54 of the Summary Jurisdiction Act, 1879, and

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(1) Summary Jurisdiction Act, 1879, s. 13, sub-s. 1: "Where a person who is an adult is charged before a Court of summary jurisdiction with an indictable offence which is specified in the first column of the First Schedule to this Act, and is not comprised in the second column of that schedule, and the Court at any time during the hearing of the case become satisfied that the evidence is sufficient to put the person

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charged on his trial for the said offence, and further are satisfied (either after such a remand as is provided by this Act or otherwise) that the case is one which, having regard to the character and antecedents of the person charged, the nature of the offence, and all the circumstances of the case, may properly be dealt with summarily, and may be adequately punished by virtue of the powers of this Act, then the Court shall cause the charge to be reduced into writing and read to the person charged, and shall then ask him whether he is guilty or not of the charge ; and if such person says that he is guilty, the Court shall thereupon cause a plea of guilty to be entered, and adjudge him to be imprisoned, with or without hard labour, for any term not exceeding six months."

Sect. 19 : " Where in pursuance of any Act, whether past or future, any person is adjudged by a conviction or order of a Court of summary juridsiction to be imprisoned without the option of a fine, either as a punishment for an offence, or, save as hereinafter mentioned, for failing to do or to abstain from doing any act or thing required to be done or left undone, and such person is not otherwise authorised to appeal to a Court of general or quarter sessions, and did not plead guilty, or admit the truth of the information or complaint, he may, notwithstanding anything in the said Act, appeal to a Court of general or quarter sessions against such conviction or order."

Sect. 54 : " . . . . Provided that the provisions contained in sections thirty-three and thirty-four of the Summary Jurisdiction Act, 1848, as to the Acts relating to the police in the metropolis and in the city of London, and relating to the powers of justices within the metropolitan police district shall not apply to or restrict the operation of this Act."

FIRST SCHEDULE.

Indictable offences which can be dealt with summarily under this Act.

FIRST COLUMN.	SECOND COLUMN.
Young persons consenting and adults pleading guilty.	Adults consenting.
1. Simple larceny.	1. Simple larceny, where the value of the whole of the property alleged to have been stolen does not in the opinion of the Court before whom the charge is brought exceed forty shillings.
4. Larceny as a clerk or servant.	4. Larceny as a clerk or servant, where the value of the whole of the property, etc.

Sect. 33 of the Summary Jurisdiction Act, 1848, provided inter alia that nothing in that Act contained should alter or effect in any manner whatsoever any of the powers, provisions or enactments contained in the Metropolitan Police Act, 1839, or in the Metropolitan Police Courts Act, 1839.

on the decision of the divisional court in *Reg.* v. *Justices of London.* (1)

On behalf of the appellant it was contended that an appeal lay under s. 50 of the Metropolitan Police Courts Act, 1839 (2 & 3 Vict. c. 71). (2)

The contention of the respondent was upheld by the Court of quarter sessions and the appellant's appeal was dismissed.

The question for the decision of the Court was whether the appellant in the circumstances above set out possessed the right of appealing against the conviction and/or against the sentence passed upon him by the magistrate.

Roome for the appellant. Inasmuch as the appellant was summarily convicted before one of the metropolitan police magistrates and sentenced to imprisonment for six calendar months he was entitled, under s. 50 of the Metropolitan Police Courts Act, 1839, to appeal to quarter sessions notwithstanding that he pleaded guilty. That section expressly gave a right of appeal to any person summarily convicted before a metropolitan police magistrate and sentenced to more than one month's imprisonment who thinks himself aggrieved by the order or conviction. The reason for giving a different right of appeal to persons summarily convicted before a metropolitan police magistrate from the right of appeal given to persons convicted before other Courts of summary jurisdiction was that in the metropolitan police courts the magistrate sat by himself, whereas two justices of the peace were necessary in order to constitute a Court of summary jurisdiction elsewhere. The succeeding words of s. 50 of the Act of 1839 were repealed by s. 4 of the Summary Jurisdiction Act, 1884 (47 & 48 Vict., c. 43), but the opening words of the section giving the right of appeal have not been repealed, it is therefore clear that the right of appeal given by the section was not intended to be taken away. If a person is charged before a Court of summary jurisdiction with an indictable offence, specified in the schedule to the Summary Jurisdiction Act, 1879, and pleads guilty and is sentenced by the Court under s. 13, he is summarily convicted. Until the Summary Jurisdiction Act, 1879, was passed a Court of summary jurisdiction had no power to deal summarily with a person charged with larceny. That Act, in effect, created a number of new summary offences—namely, larceny and suchlike offences—which formerly had been indictable offences.

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(1) [1892] 1 Q. B. 664.

(2) Metropolitan Police Courts Act, 1839, s. 50: "In every case of summary order or conviction before any of the [Metropolitan police] magistrates, in which the sum or penalty adjudged to be paid shall be more than three pounds, or in which the penalty adjudged shall be imprisonment for any time more than one calendar month, any person who shall think himself aggrieved by the order or conviction may appeal to the justices of the peace at the next general or quarter sessions of the peace . . . ."

[EARL OF READING C.J. The Act merely enabled a Court of summary jurisdiction to deal summarily with certain indictable offences if the person charged with the offence consented to be dealt with summarily or pleaded guilty.]

Where an indictable offence is authorized to be dealt with summarily the provisions of the Acts relating to offences punishable on summary conviction are under s. 27 of the Act of 1879 to apply. The Act of 1839 is one of those Acts. Under s. 19 of the Act of 1879 a person who is convicted before a Court of summary jurisdiction and sentenced to be imprisoned without the option of a fine is only entitled to appeal if he has not pleaded guilty. The appellant therefore is not entitled to appeal under that section, but the section contains a saving clause, " and such person is not otherwise authorised to appeal," which keeps alive the right of appeal given by s. 50 of the Act of 1839.

The opening words of s. 19 of the Act of 1879, " Where in pursuance of any Act, whether past or future, any person is adjudged by a conviction or order of a Court of summary jurisdiction to be imprisoned," are intended to refer to the Act which creates the offence and not to an Act like the Act of 1879, which merely creates machinery for the trial of an offence. It was held in *Reg.* v. *Justices of London* (1) that where a person is charged before a Court of summary jurisdiction with an indictable offence under s. 12 of the Act of 1879 and consents to be dealt with summarily and is thereupon convicted he has no right of appeal to quarter sessions under s. 19, because that section only gives a right of appeal from convictions by a Court of summary jurisdiction "in pursuance of any Act whether past or future." It does not follow because a man charged with an indictable offence who consents to be tried summarily loses his right of appeal that therefore a man who pleads guilty loses his right of appeal under another statute. Mr. Macmorran, who argued in that case that there is no right of appeal under s. 19 of the Act of 1879 from convictions under s. 12, incidentally referred to s. 50 of the Act of 1839 (1), but the Court did not refer to that Act in their judgment. The whole of the judgments of the Court were based upon the Act of 1879. In *Rex* v. *Dickinson* (2), which is a decision to the same effect, the Act of 1839 was also not referred to. Sect. 50 of the Act of 1839 has not been expressly repealed and it ought not to be held to have been repealed by implication.

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(1) [1892] 1 Q. B. 664.

Sir Richard Muir and *Adrian Clark* for the respondent. The decision of the magistrate was right. Under s. 37 of the Criminal Justice Administration Act, 1914, the right of appeal of a person convicted before a Court of summary jurisdiction has been very much extended. Now "any person aggrieved by any conviction of a Court of summary jurisdiction in respect of any offence" may appeal to a Court of quarter sessions provided he did not plead guilty or admit the truth of the information. Therefore the limitation on the right of appeal in s. 19 of the Act of 1879 to cases where a person is convicted and ordered to be imprisoned without the option of a fine did not apply when the charge against the appellant was decided. A number of new offences of a minor character were created by the Metropolitan Police Act, 1839, and the Metropolitan Police Courts Act, 1839, and the two Acts were intended to provide for a code of criminal procedure in respect of those offences. The right of appeal given by s. 50 of the Act of 1839, although unlimited in terms, only applied to the offences which were created by those two statutes. It was never

(1) 61 L. J. (M. C.) 105.

(2) [1910] 1 K. B. 469.

intended that the right of appeal under that section should apply to indictable offences like larceny for which a term of penal servitude could be imposed, and which could not be dealt with by a Court of summary jurisdiction previous to the passing of the Summary Jurisdiction Act, 1879. A right of appeal cannot exist until the offence is created. The right of appeal given by s. 19 of the Act of 1879 is a general right of appeal and was intended to apply to the whole of the country; it was never intended that persons charged with indictable offences before a Court of summary jurisdiction in the metropolitan area should have a different right of appeal from that which persons had who were charged with similar offences before other Courts of summary jurisdiction. The Act of 1879 prescribes in s. 19 the right of appeal in respect of indictable offences which are made triable summarily by that Act, and one of the conditions is that if the person charged pleaded guilty he loses the right of appeal. If the Legislature intended to extend the right of appeal they could have done so in 1914 when the Criminal Justice Administration Act was passed, but they did not do so. The deputy chairman of the London sessions has recently held (1) that a person charged with larceny before a metropolitan police court who pleads guilty has no right of appeal to quarter sessions.

Roome replied.

EARL OF READING C.J. The question in this case is whether the Court of quarter sessions was right in coming to the conclusion that the appellant, who had been charged before a metropolitan police magistrate with having committed an indictable offence and had pleaded guilty and been sentenced to six months' imprisonment, had no right of appeal. The question turns upon the meaning to be attributed to certain sections of the Summary Jurisdiction Act, 1879, and to s. 50 of the Metropolitan Police Courts Act, 1839.

It has been argued for the appellant that s. 50 of the Act of 1839 in terms says that in every case of conviction before a metropolitan police magistrate in which the penalty

(1) (1916) 80 J. P. Newspaper, 408.

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adjudged shall be imprisonment for any time more than one calendar month the person so convicted has the right to appeal. It is said that the words of the section are clear and unlimited in terms and that they must apply to every case after that Act was passed in which a person is sentenced to imprisonment for more than one calendar month, or adjudged to pay a penalty of more than 3*l.* In the present case the appellant was sentenced in one of the metropolitan police courts to six months' imprisonment, it is therefore contended that he has a right of appeal under s. 50 of the Act of 1839.

The answer made to that contention is that the Metropolitan Police Courts Act, 1839, and the Metropolitan Police Act, 1839, created a number of offences which could be dealt with summarily before the metropolitan police magistrates, and it is said that the right of appeal given by s. 50 of the Act of 1839 referred only to those offences. The argument is that these two statutes together made a complete code for the metropolitan police courts, and that in 1839 when those two Acts were passed magistrates had no power to deal with a case of a person charged with an indictable offence except by committing the person charged for trial. When the Summary Jurisdiction Act, 1879, was passed a special power was given to Courts of summary jurisdiction to deal with any adult person charged before the Court with any indictable offence specified in the schedule to that Act, including larceny. If the person charged pleads guilty, the Court may cause the plea of guilty to be entered and sentence him to imprisonment for any term not exceeding six months. It is quite clear that the appellant could not have been dealt with at all by a Court of summary jurisdiction except for the jurisdiction given to Courts of summary jurisdiction by that Act and the procedure therein prescribed.

It is contended on behalf of the respondent that the Legislature never intended to draw a distinction between the right of appeal of a person charged with an indictable offence committed in the metropolitan police court area and the right of appeal of a person charged with an indictable offence of a similar character committed in any other area; but that the Summary Jurisdiction Act, 1879, was of general application and was intended to lay down a code for the government of Courts of summary jurisdiction in dealing with indictable offences when there had been a plea of guilty, or the person charged had consented to be dealt with summarily by the magistrate instead of being tried by a jury. That statute introduced a very important departure from the ordinary procedure and enlarged the extent of the jurisdiction given to Courts of summary jurisdiction. In s. 19 of the same statute the right of appeal from a summary conviction to quarter sessions is prescribed. If the right of appeal under s. 19 applies to this case, and that is the only right of appeal which the appellant has, then it is clear that the appellant has no right of appeal at all, because one of the conditions of the right of appeal under s. 19 is that the appellant should not have pleaded guilty. In this case the appellant pleaded guilty and consequently he has no right of appeal under that section. No doubt that is the reason why he seeks to appeal under s. 50 of the Act of 1839 which does not impose any such condition.

I have myself a great disinclination to hold that a right of appeal which is expressly given by a statute is taken away unless I can find that the right has either been expressly or impliedly taken away by another statute. But after reviewing the Acts of Parliament I have come to the conclusion in the present case that the Legislature did not intend that a person who pleaded guilty when charged before a Court of summary jurisdiction with an indictable offence should have any other right of appeal than the right of appeal given under the statute conferring the jurisdiction upon the Court of summary jurisdiction to deal with the case.

It seems to me that by the Act of 1879 the Legislature prescribed a code in the same way as had been done by the Act of 1839; it stated the procedure to be followed, and also the conditions on which the jurisdiction of a Court of summary jurisdiction with regard to the trial of certain indictable offences could be exercised, and it gave a right of appeal which was limited in its character. In my opinion it is not unnatural that the right of appeal should be limited, because although there would be a disinclination to take away or to limit, the right of appeal of a person who has been convicted, nevertheless this statute deals with persons, as in this particular case, who have pleaded guilty, and consequently there is the less reason for objecting to the right being taken away, inasmuch as the right of appeal can only affect the sentence. The opinion I have formed is that the right of appeal of a person charged before a metropolitan police magistrate with an indictable offence which is dealt with under s. 13 of the Summary Jurisdiction Act, 1879, by such person pleading guilty and being sentenced to a term of imprisonment, is limited to the right of appeal given by s. 19 of the Act of 1879, and that s. 50 of the Act of 1839 does not apply in that case. Once that conclusion is arrived at it follows that there is no right of appeal in this case and that the order of the Court of quarter sessions dismissing the appeal was right and must be affirmed. It is unnecessary for me to say anything further with regard to s. 50 of the Act of 1839. I only desire to add that nothing that I have said is intended to take away the right of appeal which may be given under that statute save in the case of a person charged with an indictable offence before a Court of summary jurisdiction and dealt with under s. 13 of the Summary Jurisdiction Act of 1879.

I would further add that the Criminal Justice Administration Act, 1914, which deals very compendiously in s. 37 with the right of appeal from a decision of a Court of summary jurisdiction also made it a condition of the right to appeal thereunder that the person who had been convicted did not plead guilty or admit the truth of the information. I do not think it is safe to draw any special inference from that fact save to say that that section confirms the view I have formed, and it seems to me to make the Acts work perfectly simply and as intended by the Legislature.

Darling J. I am of the same opinion. It seems to me that the argument of Mr. Roome, if acceded to, would involve consequences so absurd that it is impossible for this Court to decide in favour of his contention. The consequences of deciding in favour of the appellant would be this, that a person charged before a metropolitan police magistrate, who is a skilled lawyer of great experience, with an indictable offence which is made triable summarily by the Summary Jurisdiction Act, 1879, and who pleaded guilty, would have a right of appeal to quarter sessions, whereas a person charged with a similar offence before a Court of summary jurisdiction elsewhere consisting of two or more county justices, and who pleaded guilty, would have no right of appeal to quarter sessions. It seems to me that the Legislature can never have intended to put the metropolitan police magistrate in a position obviously inferior to that of a bench of county justices, assisted as they would be by a solicitor who occasionally gives his attention to the criminal practice of the Courts. I myself very much doubt whether s. 19 of the Summary Jurisdiction Act, 1879, was not intended to limit the right of appeal in the case of other offences as well as those with which we are dealing to-day, and I do not desire that anything I say to-day should preclude it from being argued hereafter that the right of appeal given by s. 19 of the Act of 1879 is of general application and is not confined to those indictable offences which have become subject to the jurisdiction of Courts of Summary Jurisdiction by virtue of the Act of 1879, and that the unlimited right of appeal which was given by s. 50 of the Act of 1839 to persons summarily convicted before a metropolitan police magistrate is gone. Sect. 19 of the Act of 1879 is framed in very wide terms and s. 37 of the Criminal Justices Administration Act, 1914, is also framed in very wide terms. I can see no reason why a person who pleads guilty when charged before a magistrate with an indictable offence should have a right of appeal when he had no right of appeal at all until the Summary Jurisdiction Act, 1879, was passed, as before the passing of that Act indictable offences were not triable before any tribunal except a judge and jury. Therefore I agree with the decision of my Lord. I do not say anything further because it would be merely obiter. I do not desire to

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preclude some Court hereafter from deciding what it is not necessary for us to do to-day.

Sankey J. I agree.

Appeal dismissed.

Solicitor for appellant: *Pierron & Morley.*
Solicitor for respondent: *Treasury Solicitor.*

R. F. S.

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July 24, 25.

THE KING v. COMMISSIONERS FOR SPECIAL PURPOSES OF INCOME TAX.

Ex parte DR. BARNARDO'S HOMES NATIONAL INCORPORATED ASSOCIATION.

Revenue—Income Tax—Exemption—Charitable Purposes—Residuary Bequest—Assent of Executors—Relation back to Testator's Death—Mandamus to Commissioners for Special Purposes of Income Tax—Costs—Income Tax Act, 1842 (5 *& 6 Vict. c.* 35), *s.* 88, *Sched. C, r.* 3, *s.* 105.

By s. 88, Sched. C, r. 3, of the Income Tax Act, 1842, coupled with s. 105 of the Act, charitable institutions are exempted from the duties on any yearly interest or other annual payment chargeable under Sched. D in so far as the same shall be applied to charitable purposes only and the exemption is to be allowed by the Commissioners for Special Purposes on due proof before them.

A testator who died on November 14, 1914, by his will left all the residue of his property, which consisted of various stocks and shares, to a charitable institution absolutely. Between the date of the testator's death and December 4, 1916, the executors received income from the testator's estate from which income tax had been deducted in the ordinary course. The income so received by the executors was part of the fund handed over in due course by them to the charitable institution. The institution now claimed the return of the income tax deducted from the securities, on the ground that it was a tax on dividends appropriated for charitable purposes, contrary to s. 105 of the Income Tax Act, 1842.

A question had arisen with regard to the testator's will which led to litigation, but in March, 1916, a compromise was arrived at under which the charitable institution became entitled to two-thirds of the testator's residuary estate.

Between September, 1916, and December 4, 1916, certain payments were made by the executors relating to their costs in the litigation, and thereupon a sum was left in their hands which was distributed by them on December 4, 1916:—

Held, that the assent of the executors which had clearly taken place by December 4, 1916, related back to the date of the testator's death, and as it was not the intention of the Legislature to allow exemption to depend upon delays caused by administration or litigation, but to allow exemption where funds were to be used for charitable purposes only, the income of the securities was entitled to exemption as from the date of the testator's death, and that the amount which had been deducted for income tax must be returned to the charitable institution (1).

An obligation is imposed upon the Commissioners for the Special Purpose of the Income Tax Acts by s. 105 of the Income Tax Act, 1842, to allow exemption from income tax in certain cases, and to make an order for the repayment of duties which may have been paid, and if the Commissioners do not carry out those statutory duties the Court will issue a mandamus to compel them to do so at the instance of the subject who is entitled to exemption.

If the Court issues a mandamus commanding the Special Commissioners to perform their statutory duties, the Court has power to order the Commissioners also to pay costs: the common law rule that the Crown neither pays nor receives costs does not apply to that case, since the Commissioners do not merely act as servants of the Crown, but in the performance of their statutory duty.

RULE NISI obtained at the instance of the applicants, Dr. Barnardo's Homes National Incorporated Association, calling upon the respondents, the Commissioners for the Special Purposes of the Income Tax to show cause why a writ of mandamus should not issue directing them to allow exemption from income tax of the income of trust funds held under the will of one Denzil Thomson, deceased, and to repay the sum of 332*l.* 0*s.* 7*d.* deducted for income tax.

Denzil Thomson, of Brooks Road, Gunnersbury, by his will (dated June 3, 1914), left all the residue of his property, which consisted of various stocks and shares, to Dr. Barnardo's Homes absolutely. The testator died on November 14, 1914. During the period between November 14, 1914, and December 4, 1916, the executors received income from the trust funds belonging to the testator's estate, from which income tax had been deducted in the ordinary course. The income so received by the executors was part of the fund handed over in due course by them to Dr. Barnardo's Homes, the residuary legatees. Dr. Barnardo's Homes now claimed the return of the income tax deducted from the income of the securities, on the ground

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) Dec. 9th, 1919. The C.A. reversed the decision on this point. There was no appeal on the question of costs.

that it was a tax on dividends appropriated for charitable purposes, contrary to s. 105 of the Income Tax Act, 1842. There was no dispute that Dr. Barnardo's Homes was an institution for charitable purposes within the meaning of the statute. A question arose with regard to the testator's will which led to litigation, and the executors issued a writ in order that the will might be established in solemn form. Eventually, in March, 1916, a compromise was arrived at under which Dr. Barnardo's Homes became entitled to two-thirds of the testator's residuary estate. Between September, 1916, and December 4, 1916, certain payments were made by the executors relating to their costs of the suit, and thereupon a sum was left in their hands which was distributed by them on December 4, 1916.

Sir Gordon Hewart A.-G., Clayton K.C., Sheldon, T. H. Parr and *R. P. Hills* for the respondents, showed cause. The onus of proof of their right to the exemption they claim is on the applicants. In order that a charitable institution may be entitled to the exemption, three conditions must be fulfilled: (1.) The income must belong to the charity; (2.) the income must during the relevant period be applicable to charitable purposes only; (3.) it must be so applied. That all these conditions must be fulfilled appears from s. 88, Sched. C, r. 3, and s. 105 of the Income Tax Act, 1842. Sect. 98 of the Act provides that claims for exemption are to be made to the Commissioners for special purposes. The effect of s. 105, which refers back to Sched. C, is that the onus of proof of the application of the income to charitable purposes is by the third rule of that schedule placed upon the applicants. In the present case, until the executors assented to the bequest to the applicants, the fund was held by the executors and no trust arose. Until the assent to the bequest the fund belonged to the executors and was subject to no trust. The executors could bring an action of trover in respect of the fund: William on Executors, 10th ed., vol. ii., pp. 1101, 1103. When they assented they became trustees for the beneficiary, but until that date they were merely trustees to pay debts. In the present case the only assent proved is the distribution of the fund on December 4, 1916. There were no other acts or words by which their assent can be proved. The distinction between the liability of executors and trustees is shown by *Dix* v. *Burford*. (1) The fund was part of the testator's assets until the assent of the executors took place, and the applicants had no interest in it until that time.

The fund was not, until the assent, applicable to charitable purposes only. An executor may pay debts out of capital or income: *Allhusen* v. *Whittell*. (2) A residuary bequest is an indistinguishable mass: *Vanneck* v. *Benham*. (3) It follows that there is no right to any portion of a residuary estate. The fund was not applicable to charitable purposes exclusively, for it was applicable (inter alia) to debts. It is laid down by s. 88, Sched. C, r. 3, that in order to be exempt from income tax the fund must be "applied to charitable purposes only." [Sect. 61, Sched. A, No. 6, of the Income Tax Act, 1842, the Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), and Williams on Executors, 10th ed., vol. ii., p. 1108, were also referred to.]

Clauson K.C. and *Dighton Pollock* for the applicants. The income on the whole of the securities which the executors handed over to Dr. Barnardo's Homes was exempt from taxation from the date of the testator's death until the fund was distributed by them. It is true that the executors had the legal estate in the fund; but the purpose for which the income had to be applied after payment of debts and other outgoings was a charitable purpose. The applicants' proper proportion of the fund has always been dedicated to charitable purposes. The assent of the executors relates back to the date of the testator's death. Upon the facts which have happened the fund was never the property of the executors of the testator's will, but of Dr. Barnardo's Homes.

THE EARL OF READING C.J., having stated the facts, continued: On behalf of the applicants it was contended that as soon as the executors assented to the bequest of the

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(1) (1854) 19 Beav. 409.

(2) (1867) L. R. 4 Eq. 295.

(3) [1917] 1 Ch. 60.

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residuary estate—which they had undoubtedly done by December 4, 1916—they must be taken to have assented at least to the application and dedication to Dr. Barnardo's Homes of two-thirds of the assets which remained in their hands, after payment of the executors' costs of administration and of the suit, and the debts and any other outgoings.

We have to decide a question of principle and not one of amount. Our decision must depend upon the view we take of the relevant sections of the Income Tax Act, 1842—in substance upon the meaning to be attributed to s. 88, Sched. C, r. 3, and s. 105.

On behalf of the respondents it is contended that three conditions must coincide before the exemption claimed by the applicants is permissible: first, that the income belongs to or is held in trust for the charity; secondly, that the income during the relevant period is applicable to charitable purposes only; and, thirdly, it must be in fact applied to charitable purposes only. In my view the question depends upon the date at which the assent of the executors must be taken to have operated, because it is not disputed that Dr. Barnardo's Homes are an institution for charitable purposes within the meaning of the Act of 1842. It is not disputed by the respondents that from the moment the executors did in fact assent, Dr. Barnardo's Homes were entitled to the exemption. If the assent relates back to November, 1914, when the testator died the amount of 332*l.* 0*s.* 7*d.* is to be allowed as an exemption. If the assent does not relate back but only dates from the time at which the assent in fact took place, then it would follow—it is enough to say it may follow—that Dr. Barnardo's Homes would not be entitled to the exemption.

In my view—and there can be no question as to this point—the object of the Act of 1842 and of the exemption granted by it was to allow the exemption in respect of income which is to be used for charitable purposes only. It was contended before the Commissioners for the Special Purposes of the Income Tax and so decided by them that, until the executors had in fact assented, as they had the right to make payments out of capital or income, and as they had never in fact distinguished between capital and income in their hands, and had not in fact assented to these moneys being applied to charitable purposes only, it followed from the statute that Dr. Barnardo's Homes could not be brought within the exemption. I am unable to assent to that view. I think that the effect of the statute and the law applicable to executors is to make the assent, immediately it has been given, relate back and become applicable to all the moneys that were in the executors' hands which were applicable to charitable purposes, provided that the moneys were in fact applied to charitable purposes (which is not disputed in this case). The real controversy may be thus illustrated: If the executors, charged with the duty of applying the money in their hands, when they have assented to the residuary bequest hold that money for a period of years during which there is litigation, the respondents contend that notwithstanding that the money has been subsequently determined to be exclusively applicable to charitable purposes, yet the exemption does not prevail in favour of the applicants; whereas on behalf of the applicants, the residuary legatees, it is contended that, when the assent has taken place, they are entitled to the full benefit of the exemption if the other conditions to which I have referred are fulfilled.

Immediately the Court is satisfied, as I am, that the assent given relates back, and that the moneys were applicable to charitable purposes only, and were in fact so applied, I think there is no question remaining in controversy.

Our attention was called to a passage in Williams on Executors, 10th ed., vol. ii., p. 1108, in which it is said: "The assent of an executor shall have relation to the time of the testator's death: Hence, in the case of a devise of a term of years in tithes . . . . if after the testator's death, and before the executor's assent, tithes are set out . . . . the assent by relation shall perfect the legatee's title to these several interests." I exclude the references to realty contained in the passage as in the present case the will deals only with personalty. In my judgment, that principle is applicable to the

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present case. When once I have come to that conclusion the point which is in dispute is answered. I am glad that I am able to arrive at this determination of the controversy, because I cannot but think that it was the intention of the legislature that the exemption to be given was not to depend upon how long litigation, or the payment of or inquiry as to debts, or the administration, was kept open by the executors, but that it was to be applied for the benefit of the charitable purposes, as soon as it had been established that the moneys were applicable to charitable purposes and had in fact been so applied. Although it is quite true that the exemption could not be claimed so long as there had been no assent, yet I think that, immediately the assent has taken place and it is clear and unequivocal, as it is in this case, that the moneys so held were by virtue of that assent moneys applicable to these purposes and were in fact so applied, then the charitable objects—in this case Dr. Barnardo's Homes—are entitled to the benefit of the exemption. For these reasons I am of opinion that the rule should be made absolute.

DARLING J. I am of the same opinion and for the same reasons.

BRAY J. I agree.

Rule absolute.

J. E. A.

Clauson K.C. applied that the rule should be made absolute with costs.

Sir Gordon Hewart A.-G. This is not a case in which costs should be given. The common law rule applies, that the Crown neither pays nor receives costs: 3 Blackstone's Com. p. 400. It was held in *Rex* v. *Archbishop of Canterbury* (1) that where the Crown is a party to the argument of a rule for a prerogative writ of mandamus the Court has no jurisdiction to give costs either to or against the Crown. See Robertson's Civil Proceedings by and against the Crown, p. 619. The Special Commissioners of Income Tax are the servants of the

(1) [1902] 2 K. B. 503, 571.

Crown receiving a salary. They are employed for the whole of their time on administrative work in connection with income tax and super-tax; they also exercise judicial function on appeals. These proceedings are really against the revenue authorities, and not against the Commissioners personally, inasmuch as the order asked for is for the repayment of money which has never come into the hands of the Special Commissioners, but has been paid into the Treasury, and the Attorney-General appears in order to defend the revenue of the Crown. There is a special provision in s. 59 of the Taxes Management Act, 1880, with reference to cases stated for the opinion of the High Court under which the Court may make such order as to costs as to the Court may seem fit. There is, however, no statutory authority under which Special Commissioners can be ordered to pay costs. The Crown Suits Act, 1855 (18 & 19 Vict. c. 90), provides for the payment of costs to and by the Crown in all informations, actions, suits and other legal proceedings by or on behalf of the Crown in the same manner as in proceedings between subject and subject. The old doctrine of the common law that the Crown neither pays nor receives costs is still in existence unless specially excluded by an Act of Parliament, or unless there is a necessary implication to be drawn from the provisions of the Act, or from the legislation on the subject. See Short & Mellor's Practice of the Crown Office, 2nd ed., p. 389; *Moore* v. *Smith*. (1) In *Gresham Life Assurance Society* v. *Attorney-General* (2) the Solicitor-General said: "This is one of those cases in which the Crown neither pays nor receives costs." That shows that in the absence of statutory authority there is no power to award costs against the Crown. A memorandum made by Lord Blackburn with respect to costs is appended to the report of *Mews* v. *The Queen* (3) stating that the judgment was reversed, and it was ordered that the respondent, who was the Attorney-General acting for the Crown, should pay the costs. As he had received costs in the Court below it was taken for granted that he ought to pay them. These costs

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(1) (1859) 1 E. & E. 597.

(2) [1916] 1 Ch. 228, 242.

(3) (1882) 8 App. Cas. 339, 353.

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were accepted per incuriam, but that having been done, the Attorney-General agreed not to take any objection in the special circumstances, but it was wished to prevent the case being in future cited as a precedent. There are several instances of mandamus proceedings against Special Commissioners in which costs have been given either to or against the commissioners: *Commissioners for Special Purposes of the Income Tax* v. *Pemsel* (1); *Reg.* v. *Special Commissioners of Income Tax; In re G. Fletcher* (2); *Rex* v. *Commissioners for Special Purposes of the Income Tax; Ex parte University College of North Wales.* (3) Those cases may be explained upon the ground that costs were given either ex gratia or per incuriam without discussion. The normal practice in such cases is that no costs should be given: see *Rex* v. *Inland Revenue Commissioners* (4), where counsel appearing for the Commissioners said: "The rule for mandamus will be discharged without costs. It is not a case in which the Crown either pays or receives costs."

[BRAY J. Rule 261 of the Crown Office Rules, 1906, provides that "Order LXV. of the Rules of the Supreme Court, 1883 (Costs), shall as far as it is applicable, apply to all civil proceedings on the Crown side." Order LXV., r. 1, provides that "subject to the provisions of the Acts and these Rules the costs of and incident to all proceedings in the Supreme Court . . . . shall be in the discretion of the Court or judge."]

It was held in *In re Mills' Estate, Ex parte Commissioners of Works and Public Buildings* (5) that the Judicature Acts and Rules of Supreme Court, 1883, Order LXV., r. 1, do not enable the Court or a judge to order costs to be paid by persons who before the Acts came into operation could not have been ordered to pay them: the effect and intention of the Acts and Orders being not to give any new jurisdiction to award costs, but only to regulate the mode in which costs are to be dealt with in cases where the Court antecedently had jurisdiction, either original or statutory, to award costs.

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(1) [1891] A. C. 531, 592.

(2) (1894) 3 Tax Cas. 289, 293.

(3) (1909) 5 Tax Cas. 408, 416.

(4) [1917] 2 K. B. 405.

(5) (1886) 34 Ch. D. 24.

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Clauson K.C. The common law rule that the Crown neither receives nor pays costs unless there is statutory authority is not in any way questioned; neither is it contended that the Court has jurisdiction to issue a writ of mandamus against servants of the Crown acting in an executive character. The Special Commissioners of Income Tax are, however, not servants of the Crown acting in an executive capacity; they are persons, paid out of the funds of the Crown, who have certain statutory duties to perform, and if they do not carry out those duties the Court will issue a writ of mandamus to compel them to do so. Sect. 105 of the Income Tax Act, 1842, provides that charitable institutions are exempt from the duties on interest chargeable under Sched. D, and "such exemption shall be allowed by the Commissioners for special purposes, on due proof before them, and the amount of the duties which shall have been paid by such [institution] . . . . shall be repaid under the order of the said Commissioners." Therefore the Special Commissioners are under an obligation to allow the exemption upon due proof before them, and also to make an order for repayment of the duties so paid. Lord Halsbury L.C. in *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (1) said that "the statute under which the Commissioners are acting is peremptory in its terms to the Commissioners to make the allowance, and to give the certificates in cases where they are commanded to be given. If, therefore, the case is made out that the facts shew a case where the allowance ought to be made, and the certificate, which is merely consequential, should be given, there is a plain duty imposed by the statute on these executive officers, the neglect of which is properly enforceable by mandamus." Lord Herschell also said (2): "I confess it appears to me very clearly to be a case for a mandamus if the Commissioners have wrongly refused to grant the allowance and to give the certificate provided for by the statute. The duty of granting the allowance in certain specified cases is imposed upon the Commissioners by the statute in unequivocal terms." As was pointed out by Lindley L.J. in *Reg.* v. *Commissioners for Special*

(1) [1891] A. C. 539. (2) [1891] A. C. 569.

Purposes of the Income Tax (1), the application is not to enforce payment of money by the Crown, but to enforce the making of an order by the Commissioners which it is the duty of the Commissioners to make, and without which the repayment cannot be obtained. The fact that the Crown is interested in the proceedings and that the law officers are instructed to appear does not turn the Special Commissioners into the Crown so as to make the common law doctrine apply: *Rex* v. *Archbishop of Canterbury.* (2) If the Special Commissioners are not to be treated as the Crown, then r. 261 of the Crown Office Rules provides that Order LXV. of the Rules of the Supreme Court shall, as far as it is applicable, apply to all civil proceedings on the Crown side, and under Order LXV., r. 1, the costs of and incidental to all proceedings in the Supreme Court are in the discretion of the Court or judge. Sect. 5 of the Judicature Act, 1890 (53 & 54 Vict., c. 44), was passed in order to get rid of the decision in *In re Mills' Estate* (3); the Court has now full discretion over the costs of and incident to all proceedings in the Supreme Court. In *Rex* v. *Board of Education* (4) the Court made absolute with costs a rule for mandamus directed to the Board of Education. That decision was affirmed by the Court of Appeal (5) and by the House of Lords. (6) The fact that the Special Commissioners have no funds out of which to pay costs will not prevent the Order from being made. It is too late to contend that a writ of mandamus will not lie against the Special Commissioners as it has been granted against them in several cases. If the Court can grant a mandamus against them it is difficult to see why the Court cannot order them also to pay costs. [*In re Wood's Estate; Ex parte Her Majesty's Commissioners of Works and Buildings* (7) was also cited.]

Sir Gordon Hewart A.-G. in reply. The Court in *Rex* v. *Archbishop of Canterbury* (8) expressly left open the question whether the writ of mandamus would lie against officers of executive departments of the public service in relation to their statutory or other duties. The true view is that the Special Commissioners are servants of the Crown with statutory duties to perform, and that therefore mandamus will lie against them, but that they are at the same time so closely allied to the Crown that the common law rule with regard to the costs of the Crown applies to them. It does not follow that because a writ of mandamus will lie against the Special Commissioners that therefore costs can be given against them. Whenever the matter has been discussed the decision has always been in favour of the Crown neither paying nor receiving costs.

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(1) (1888) 21 Q. B. D. 313, 322.
(2) [1903] 1 K. B. 289.
(3) 34 Ch. D. 24.
(4) [1909] 2 K. B. 1045.
(5) [1910] 2 K. B. 165.
(6) [1911] A. C. 179.
(7) (1886) 31 Ch. D. 607.
(8) [1902] 2 K. B. 572.

[DARLING J. referred to *Reg.* v. *Secretary of State for War.* (1)]

EARL OF READING C.J. The question we have now to decide is whether or not this Court has power to order the Commissioners for the Special Purposes of the Income Tax Acts to pay costs where the Court has made absolute a rule for a mandamus commanding the Commissioners to do certain things, namely, to allow an exemption and to make an order for repayment. The argument on behalf of the Commissioners may be stated quite briefly in the following proposition: That the Commissioners for the Special Purposes of the Income Tax Acts are to be regarded for these purposes as the Crown, and at common law the rule is that the King and any person suing to his use neither pays nor receives costs. To quote from 3 Blackstone's Commentaries at p. 400: "As it is his prerogative not to pay them to a subject, so it is beneath his dignity to receive them." The common law rule still prevails; costs are not payable by the subject in an unsuccessful litigation with the Crown, nor by the Crown in an unsuccessful litigation with a subject. If this case fell within that proposition then I should accede at once to the Attorney-General's contention that no costs could be ordered against him. But there is another proposition of law which has been invoked in this case by the successful applicants. The proposition is stated by Lord Esher M.R. in *Reg.* v. *Commis-*

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(1) [1891] 2 Q. B. 326.

sioners for Special Purposes of the Income Tax. (1) It is to be observed that the question in that case was whether a mandamus would lie to the Commissioners for Special Purposes of the Income Tax Acts, that is, to the same officials who have been ordered by this Court to do certain acts. In that case the Commissioners had refused to issue certain orders for repayment, and the Court ordered a writ of mandamus to issue. Lord Esher says this : " With regard to the question whether mandamus will lie, I am of opinion that the case falls within the class of cases, where officials having a public duty to perform, and having refused to perform it, mandamus will lie on the application of a person interested to compel them to do so." To my mind that is a far-reaching and most salutary provision of the common law. It is true that we, sitting here in the King's Court, and issuing orders commanding persons to carry out duties in the name of the Crown, cannot order the Crown to carry out a duty, yet we can order persons who are charged with statutory obligations to carry out those obligations if they fail to do so, provided they come within the terms of the proposition laid down by Lord Esher. It has been said by this Court on more than one occasion that the Court cannot issue a mandamus directed to the Crown or to a person simply acting in his capacity of servant of the Crown. Cockburn C.J. in *Reg.* v. *Lords Commissioners of the Treasury* (2) said : " With reference to that jurisdiction,"—namely, the jurisdiction with regard to the issue of a mandamus directed to the Crown or to a person simply acting in his capacity of servant of the Crown—" we must start with this unquestionable principle, that when a duty has to be performed (if I may use that expression) by the Crown, this Court cannot claim even in appearance to have any power to command the Crown ; the thing is out of the question. Over the Sovereign we can have no power. In like manner where the parties are acting as servants of the Crown, and are amenable to the Crown, whose servants they are, they are not amenable to us in the exercise of our prerogative jurisdiction." In my judgment that principle of law is not applicable in this case,

(1) 21 Q. B. D. 317.

(2) (1872) L. R. 7 Q. B. 387, 394.

that is to say, I do not think this is a case in which the jurisdiction of this Court has been invoked to order the Crown (if one may use that expression) to do a particular act, or to order a person who is a servant of the Crown, and amenable to the Crown, to do a particular act. There must be something more than that before we can order a mandamus.

In this case, however, I think that it is clear that the Commissioners for Special Purposes were charged with a duty created by statute, and, as we have already decided, that they have failed to carry out that duty. Sect. 105 of the Income Tax Act, 1842, after providing that charitable institutions are entitled to exemption from the duties on interest chargeable under Sched. D, provides that "such exemption shall be allowed by the Commissioners for Special Purposes, on due proof before them, and the amount of the duties which shall have been paid by such corporation, fraternity, society or trustee . . . . shall be repaid under the order of the said Commissioners for Special Purposes in the manner hereinbefore provided." The Commissioners for Special Purposes in the present case failed to allow the exemption on due proof before them, and failed to make the order which it was incumbent upon them by statute to make, and this Court has issued a mandamus commanding them to allow the exemption and to make an order for repayment, which order may be taken to the proper officer at His Majesty's Treasury so that the money which has been deducted at the source from moneys which we have held were moneys properly applicable to charitable purposes and to which the exemption applies, should be returned. We have held that this 332*l*. 0*s*. 7*d*. was money which Dr. Barnardo's Homes were entitled to have returned to them, and this is the only way they can get it and is the proper remedy. It may be there is a tendency not to look as closely as one should at the actual order made, or to the position occupied by the person to whom the order is addressed, and therefore when we come to a question of this kind it is essential to see exactly how the matter stands.

In my judgment, it follows from the fact that the Court can issue, and have issued, a mandamus directed to the

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Commissioners for Special Purposes, commanding them to perform their statutory duties that the Court can also order them to pay the costs, just as the Court could have ordered the applicants if they had been unsuccessful to have paid the costs. In other words, I think that the common law rule with reference to the costs of the Crown has no application to a case where an official is charged with the performance of a duty imposed by statute, but is also discharging functions as a servant of the Crown. To my mind, the fact that he is charged with the performance of a duty by the express provision of a statute makes an essential distinction. It seems to me to follow as a matter of course that wherever the Court can order a mandamus to issue to an officer charged with the performance of a statutory duty it can order that officer to receive or pay costs, for the reason that the mandamus is not an order directed to the Crown, which this Court can never issue, but is an order directed to an officer who is bound to perform a certain duty imposed upon him by statute.

It is interesting to observe that in a number of cases which have come before the Divisional Court the Court has made orders upon the Commissioners for Special Purposes to pay or receive costs. I do not propose to go through them because in my opinion, although it was proper to have our attention directed to them, they do not form a satisfactory ground upon which to base a decision inasmuch as the point was never really argued. There is at least one case in the House of Lords in which costs were ordered to be paid by the Commissioners for Special Purposes. There are undoubtedly other cases, notably the case to which our attention was called of *Rex.* v. *Inland Revenue Commissioners* (1), in which it has been pointed out by counsel representing the Commissioners that such cases come within the general rule of the common law that costs are neither paid nor received by the Crown. Sometimes there has been acquiescence in costs being paid by the Special Commissioners; in some cases because the counsel representing the Special Commissioners has said that although the Commissioners cannot be ordered to pay costs yet as a matter of concession they will pay the costs of the successful applicant, in other cases the matter has passed sub silentio. Those cases therefore do not, in my opinion, assist us.

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(1) [1917] 2 K. B. 405.

The point has been fully argued before us to-day. In my opinion it is of public importance that persons who have a dispute with the Commissioners for Special Purposes of the Income Tax, where they think that they have a right to exemption and a return of income tax deducted at the source, and an order has been refused to them by the Commissioners, should know that they can come to this Court and invoke the jurisdiction of this Court, and that if they are successful in the litigation they are entitled to receive the costs from the Commissioners. I have considered very carefully, whether or not this general rule so laid down would lead to public inconvenience, and I have come to the conclusion that it is really for the public convenience that the rule should be stated and understood for the future in the sense that we have laid down, so that there should be no misunderstanding. The Crown has no interest in resisting the jurisdiction of this Court, although the Crown has naturally put forward arguments to assist us as against those presented by Mr. Clauson. It may or may not turn out to its interest to pay and receive costs, but it certainly has no interest so far as I can see in resisting this general rule. The Crown represents the public, and such uncertainty as existed is removed by virtue of what we have decided to-day.

For the reason I have already stated, and also because I prefer to base my decision upon the broad principle which I laid down at the beginning of my judgment, and to stand by that, I do not think it necessary to go through the authorities to which our attention has been called. I will only add that in the case of the General Commissioners, and certainly with reference to cases stated under s. 59 of the Taxes Management Act, 1880, there is an express provision with regard to costs. No doubt one finds in a number of cases express provisions in order to remove doubts and to make clear what the jurisdiction of the Court is. I, however, do not find anything in any of the authorities to which our attention has been called which prevents this Court from laying down the rule as I have enunciated it. On the contrary I find much support for it, particularly in *Pemsel's Case* (1) and the other cases which have been cited in which this Court has purported to exercise this jurisdiction.

On the whole, therefore, I have come to the conclusion that this is a case in which we have jurisdiction to issue a mandamus to the Commissioners, and as we stated yesterday, we exercise that jurisdiction in favour of the successful applicants and say that the Commissioners must pay the costs.

DARLING J. I am of the same opinion. It is remarkable that a question which merely has to do with costs should raise, as I think this does, an argument of great importance from a constitutional point of view. The decision to which we are coming to-day is to my mind a decision of great moment, but I think it has been sufficiently argued to enable us to arrive at what I believe to be the correct conclusion. The question is whether or not costs can be given to the successful applicants. If costs cannot be given to them it must be because notwithstanding that the applicants have obtained a mandamus against the Special Commissioners, the Commissioners must really be regarded as the Crown exercising its prerogative, and that therefore no costs can be given against them. If the Special Commissioners are in effect the Crown and if, because they are the Crown, the prerogative protects them from paying the costs of this mandamus, in my opinion it is impossible to say that they are subject to the mandamus, because this Court derives all its authority from the Crown, and can make no order against the Crown itself although it may make orders against persons who have neglected or refused to perform duties imposed upon them by the Crown. The matter was considered by Cockburn C.J., who always dealt with these questions on broad, well-ascertained principles, in the case of *Reg.* v. *Lords Commissioners of the Treasury.* (2) He was dealing with the question of the jurisdiction of this

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(1) [1891] A. C. 531.

(2) L. R. 7 Q. B. 394.

Court to issue a writ of mandamus, and he said this: "I take it, with reference to that jurisdiction, we must start with this unquestionable principle, that when a duty has to be performed (if I may use that expression) by the Crown, this Court cannot claim even in appearance to have any power to command the Crown; the thing is out of the question. Over the Sovereign we can have no power. In like manner where the parties are acting as servants of the Crown, and are amenable to the Crown, whose servants they are, they are not amenable to us in the exercise of our prerogative jurisdiction." He came to the conclusion that the Lords of the Treasury had not done what they ought to have done, and he said further (1): "Although the Lords of the Treasury have made a very great mistake, and although the present state of things is of the most anomalous and most unsatisfactory character, I regret to say, according to the true principle upon which this prerogative jurisdiction ever has been and ought to be exercised, I do not see that this Court has authority to issue this writ of mandamus."

We have come to the conclusion in the present case that the Special Commissioners of Income Tax have made a very great mistake, but we have also come to the conclusion that things are not of an anomalous and unsatisfactory character with regard to the Special Commissioners of Income Tax, and that we can issue this mandamus; it has not been really argued by the Attorney-General that we could not issue a mandamus against Special Commissioners. It is only when we come to the question of costs that any difficulty arises. Now if we can issue a writ of mandamus against the Special Commissioners, and if the Commissioners have to obey the writ, what is there to prevent this Court making an order that the Commissioners should pay the costs? The only argument against their being ordered to pay the costs is that they are the Crown acting in the exercise of the Crown's prerogative, and that the rule which prevents the Crown being ordered to pay costs applies. That rule as expressed by Sir William Blackstone is as follows: The Crown cannot be made to pay

(1) L. R. 7 Q. B. 395.

costs because what it is doing is done by its prerogative, and there is no Court above the prerogative of the Crown; the Crown will not receive costs because it is beneath the dignity of the Crown to receive costs. But I find many cases in the books where people in the position of the Special Commissioners have received costs, and when their dignity does not seem to have prevented their receiving costs. When necessary they rely upon the prerogative of the Crown in order to escape paying costs, but they are content to forget their dignity occasionally when it is a question of receiving costs. In my opinion these Special Commissioners are merely salaried officials of the department which collects the taxes; they are not great officers of the State, but merely subordinates, and as we cannot confuse them with the Crown so as to hold that their dignity is such that they could not stoop to receive costs, so neither have they the prerogative not to pay them. The conclusion therefore at which I have arrived is exactly that which has been expressed by the Lord Chief Justice.

The Lord Chief Justice asked whether if we decided that costs should be paid by the Special Commissioners—we know quite well that the costs will be reimbursed to them by the public department—we should be doing something which would be greatly to the public detriment. Of course we do not desire to do anything which would be inconvenient, although if the law compels us we must do it. So far we have not heard any argument to show that our decision will be against the public interest or unjust to any individual. I feel bound to say that in my opinion there are many cases in which taxpayers have a right to be exempt from payment of income tax or are entitled to a return of income tax already paid, but who do not know all their rights, and I believe that this ignorance is sometimes taken advantage of by those who demand the taxes or resist their return. So far from being a disadvantage, I believe that this decision of ours is a just one, and I hope that it will be fruitful of further justice.

BRAY J. I agree. In this case we have made absolute a rule for a mandamus to the Commissioners for Special Purposes of the Income Tax Acts commanding the Commissioners to allow an exemption and to make an order for repayment. The applicants who have succeeded have asked that the Commissioners should be ordered to pay the costs. The Attorney-General's answer to the application is that the common law rule—namely, that the Crown neither pays nor receives costs—applies in this case. The question which we have to determine is whether or not that rule applies.

In order to see whether or not the common law rule is applicable it is necessary to see what is the nature of the mandamus which the Court has issued against the Commissioners. The mandamus is granted requiring the Commissioners to perform a duty which is imposed upon them by s. 105 of the Income Tax Act, 1842, which provides " and such exemption shall be allowed by the Commissioners for Special Purposes, on due proof before them, and the amount of the duties which shall have been paid by such corporation, fraternity, society, or trustee in respect of such interest or yearly payment, either by deduction from the same or otherwise, shall be repaid under the order of the said Commissioners for Special Purposes, in the manner hereinbefore provided for the repayment of sums allowed by them, in pursuance of any exemption contained in the said Sched. (C)." The mandamus therefore is for an order that the Commissioners do make the order for repayment there referred to. In making the order for repayment are they servants or representatives of the Crown, or are they persons interposed between the subject and the Crown? In my opinion that question was practically decided in the case which has already been referred to of *Reg.* v. *Commissioners for Special Purposes of Income Tax.* (1) Lord Esher's judgment has been already cited. There is, however, an important passage at the end of the judgment of Lindley L.J. to which I should like to refer, where he said (2): " With regard to the question whether mandamus would lie, I have looked into the authorities, and I come to the conclusion

(1) 21 Q. B. D. 313. (2) 21 Q. B. D. 322.

that the case is one in which it will lie. It is no doubt difficult to draw the line, and some of the cases are not easy to reconcile; but I think that the counsel for the applicants were right in saying that the application is not to enforce payment of money by the Crown, but to enforce the making of an order by the Commissioners which it is the duty of the Commissioners to make, and without which the repayment cannot be obtained."

If the Commissioners were merely the servants of the Crown it is quite clear that the order for the mandamus would not lie. That has been decided more than once. It was quite clearly decided by the Court of Appeal in *Reg.* v. *Secretary of State for War.* (1) Lord Esher there said: "Assuming that the Crown were under any obligation to make this allowance to the claimant, a mandamus would not lie against the Secretary of State, because his position is merely that of agent for the Crown, and he is only liable to answer to the Crown whether he has obeyed the terms of his agency or not: he has no legal duty as such agent towards any individual."

In this case according to the decision which I have cited it seems to me it is clear that these Special Commissioners are not acting merely as servants of the Crown. It may be that they are answerable to the Crown, but they are also answerable to the subject who is entitled to exemption. They are directed to make an order without which the repayment cannot be obtained. That being the case it seems to me quite clear that the common law rule does not apply because in fact the order for costs is not against the Crown; the order for costs is against the Commissioners for Special Purposes of the Income Tax Acts, who have an independent position and are answerable to the subject if they have refused to make an order for repayment which they ought to have made. On these grounds I am of opinion that the rule for mandamus must be made absolute with costs. I ought perhaps to add that it is not usual to make this order until it has been determined whether the parties against whom the mandamus goes are going further or not, but no objection has been taken on that ground, and

(1) [1891] 2 Q. B. 326, 338.

therefore I do not think we need pursue the inquiry as to whether it is premature or not.

Rule absolute for mandamus with costs.

Solicitors for applicants: *Nisbet, Daw & Nisbet.*
Solicitor for Commissioners: *Solicitor of Inland Revenue.*

R. F. S.

REX v. VICAR AND CHURCHWARDENS OF BREDWARDINE.

Ex parte BURTON-PHILLIPSON.

1919
Oct. 17.

Ecclesiastical Law—Churchwarden—Qualification for Office—Residence.

A person to be legally qualified to fill the office of churchwarden in a parish must reside within that parish; it is not sufficient to qualify him for election, that he occupies land in the parish and spends a great part of his time there.

Reg. v. *Harding* (1889) 6 Times L. R. 53 and *Reg.* v. *Cree* (1892) 67 L. T. 556 followed.

RULE for a mandamus directed to the vicar and churchwardens of the parish of Bredwardine, in the county of Hereford, requiring them to convene a vestry meeting for the election of a people's churchwarden for the year ending Easter, 1920.

At the Easter vestry for the parish held on April 21, 1919, Miss B. J. W. Burton-Phillipson and Mr. John Hancox were proposed for the office of people's churchwarden. Miss Burton-Phillipson objected that Mr. Hancox was not eligible for election on the ground that he was not resident in the parish of Bredwardine. Mr. Hancox's house was about twenty yards outside the boundary of the parish of Bredwardine but a large part of his farm was in the parish, and here was also a workman's cottage within the parish, for which he paid rates. It also appeared that Mr. Hancox was, and had been for many years, a regular attendant and communicant at Bredwardine church; that he spent a very large portion of his time in Bredwardine parish; and that he was well acquainted with all the principal inhabitants, and the affairs, of that parish. The vicar of Bredwardine, who was chairman of the meeting, overruled the objection, and Mr. Hancox was elected by five votes to four.

Charles K.C. (*Jowitt* with him) showed cause. The law on this subject as it stood in 1886, when the sixth edition of Cripps's Law Relating to Church and Clergy was published, is thus laid down at pp. 173, 174 of that work: "It may be stated generally, that every parishioner must serve the office of churchwarden, if legally chosen into it; nor is it essential to constitute a person parishioner that he should be actually residing within the parish; for if he occupy a farm, or be partner in a house of trade situate within the parish, he will be equally considered as a parishioner." That was the view accepted in the old Ecclesiastical Courts. See *Stephenson* v. *Langston.* (1) But in 1889 a Divisional Court, consisting of Lord Coleridge C.J. and Mathew J., decided in *Reg.* v. *Harding* (2) that a person to be eligible for the office of churchwarden must live in the parish or that there must be some kind of occupation by him equivalent to actual residence. At the conclusion of his judgment Lord Coleridge said that for this purpose it was necessary that the person elected "should live in the parish, be acquainted with the parishioners, and thus be able to exercise the duties of his office, which were to be personally exercised." That case was approved and followed in *Reg.* v. *Cree* (3), but it is to be observed that in neither of those cases were the facts the same as those in this case. Here, practically the whole of Mr. Hancox's life, except the hours of sleep, is spent in the parish of Bredwardine; he occupies and is rated for a farm and cottage within that parish; he knows the affairs of the parish and is in personal touch with the inhabitants. If *Reg.* v. *Harding* (2) stereotypes the law by requiring that a person to be eligible for the office must

(1) (1804) 1 Hagg. Cons. 379.

(2) 6 Times L. R. 53, 54.

(3) 67 L. T. 556.

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sleep in the particular parish a result may be produced which will be in conflict with the reasons upon which the decision was based, for a person may sleep in the parish and conceivably know none of the parishioners. If a person lives in a parish for sixteen hours out of the twenty-four and sleeps during the remaining eight hours in an adjoining parish he can more properly be said to live in the parish where he spends the greater part of his time than in that where he spends the night. Mr. Hancox was therefore eligible for the office. [*Rex* v. *Townson* (1) was also referred to.]

Hansell in support of the rule was not called upon.

Earl of Reading C.J. In this case the question is whether Mr. Hancox, who was declared to have been elected a churchwarden for the parish of Bredwardine, was legally qualified to fill that office. The test laid down is whether the person seeking election resides in the particular parish. Applying that test to the present case it cannot be said that Mr. Hancox lives in the parish of Bredwardine. It is not indeed suggested that he slept in that parish or resided there in the ordinary sense of that word. He occupies a farm which is partly in the parish of Bredwardine, but his dwelling house is in the adjoining parish, close to the boundary of the parish of Bredwardine. His occupation of the farm in the parish of Bredwardine and the fact that there is in that parish a workman's cottage attached to the farm for which he is rated, are relied upon as sufficient to constitute residence by Mr. Hancox in the parish of Bredwardine. No suggestion is made that Mr. Hancox is not personally a fit and proper person to be elected churchwarden; the sole question is whether he is legally qualified to be elected. Mr. Charles, to whom we are indebted for his argument, has called our attention to the various authorities for and against his contention, and has argued that living in a parish does not necessarily mean sleeping there; but in my judgment we are bound by the decisions in *Reg*. v. *Harding* (2) and *Reg*. v. *Cree* (3), where this

(1) (1908) 24 Times L. R. 690.

(2) 6 Times L. R. 53.

(3) 67 L. T. 556, 557.

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precise point was dealt with. The argument presented to us by Mr. Charles is substantially the same as was put forward in *Reg.* v. *Harding* (1), and Lord Coleridge C.J. and Mathew J. then came to the conclusion that, notwithstanding certain decisions in the Ecclesiastical Courts to the contrary, a person not living in the parish was not, by the common law, qualified to be elected to the office of churchwarden. In the later case of *Reg.* v. *Cree* (2) the point came again before a Divisional Court, consisting of Mathew and Bruce JJ., which approved the law as laid down in *Reg* v. *Harding.* (1) Mathew J. said this: "The general law applicable to the qualifications of churchwardens is quite clear, and is correctly laid down in *Reg.* v. *Harding* (1) (to which decision I was a party), namely, that a person in order to be qualified for election as churchwarden must be resident within the parish." Bruce J. said that "a 'fit and proper person' means a fit and proper person resident within the parish." These authorities are a sufficient answer to the argument of Mr. Charles. The only other case which appears to have some relevance is *Rex* v. *Townson* (3) which, however, does not dissent from the principle of law laid down in the two cases I have referred to, but the Court there in applying that principle to the particular facts, took the view that it was not established that the gentleman whose qualification was in question did not live within the parish, and refused to interfere with his election. In this case the rule must be made absolute.

AVORY J. I agree that the rule must be made absolute. I express no independent judgment of my own because I think we are bound by the decisions in *Reg.* v. *Harding* (1) and *Reg.* v. *Cree.* (2) The law there laid down is stated in the same way in Prideaux's Duties of Churchwardens (16th ed., p. 6), where it is said that generally speaking, all persons, inhabitants of the parish, are liable to serve the office of churchwarden, and that the word inhabitant means a resident inhabitant and not merely one who occupies land in the parish but does not dwell there.

(1) 6 Times L. R. 54.
(2) 67 L. T. 556, 557.
(3) (1908) 24 Times L. R. 690.

SANKEY J. I agree. We are bound by the decision in *Reg.* v. *Harding.* (1) The old law as stated in Gibson's Codex is that for this purpose an inhabitant means a person who resides in the parish, and does not mean a person who merely occupies land in the parish without residing there.

Rule absolute.

Solicitors for rule: *Leman & Co.*

Solicitors showing cause: *Vizard, Oldham, Crowder & Cash for Humfrys & Symonds, Hereford.*

J. S. H.

ROBBINS *v.* COMMISSIONERS OF INLAND REVENUE.

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June 20, 23.

Revenue—Excess Profits Duty—"Trade or business"—Occupation of whole Time Servant—General Sales Manager—Finance (No. 2) Act, 1915 (5 *&* 6 *Geo.* 5, *c.* 89), *ss.* 38, 39, 45, *sub-s.* 2, *Fourth Schedule, Part I., clause* 5—*Finance Act,* 1916 (6 *&* 7 *Geo.* 5, *c.* 24), *s.* 49, *sub-ss.* 2, 3.

The occupation of a person, who, under a contract between himself and a foreign company, is bound to give his whole time to selling their machines in this country for a commission on the prices of the machines sold, is not a "trade or business" owned or carried on by him within the meaning of the Finance (No. 2) Act, 1915, Part III., relating to the excess profits duty, and consequently he is not liable in respect of his occupation to be assessed to that duty.

CASE stated by the Commissioners for the Special Purposes of the Income Tax Acts.

At a meeting of these Commissioners held on November 20, 1916, Herbert E. Robbins, hereinafter called "the appellant," appealed against an assessment in the sum of 1593*l.* made upon him by the Commissioners of Inland Revenue, hereinafter called "the respondents," to excess profits duty for an accounting period of one year from March 31, 1915, to March 31, 1916.

Before 1909 the appellant was in the service of different companies in the United States of America as sales manager.

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(1) 6 Times L. R. 53.

From 1909 to 1913 he was in the employment in the United Kingdom in a subordinate capacity of the Felt and Tarrant Manufacturing Company of Chicago, hereinafter called "the company," who were, inter alia, the patentees and manufacturers of a calculating machine known as the comptometer.

By an agreement made on April 8, 1913, at Chicago, in the United States, by and between the company and the appellant, the company granted to the appellant the exclusive right to sell comptometers in the United Kingdom, thereinafter called "the territory," for fourteen months or until June 8, 1914, conditionally on the fulfilment by the appellant, of the terms and obligations thereinafter related. By the agreement the company agreed : (1.) to furnish a working stock of comptometers to a quantity which they deemed desirable and necessary for the business, (2.) to pay all transportation charges to the territory on all comptometers shipped by them to the appellant, or on his order, (3.) to exercise their best endeavours to prevent any comptometers from being sold to parties in the territory without the appellant receiving his full commission thereon, (4.) to pay the rent of the main office in London, the size, location and cost of that office being such as the company might authorize from time to time, to pay as to this office for the heating, cleaning, lighting, office furniture, office supplies, telephone, rates and taxes, and such postage, printing, stationery and advertising as the company deemed necessary for the business, but to pay no travelling expenses such as railroad, car, 'bus and carriage fares, and hotel bills, (5.) that on each comptometer sold in the territory during the contract the company would grant to the appellant a commission of 30 per cent. on the cash received from each sale ; that, as to when commission was to be considered earned, the company was not bound to pay any commission on any comptometer sold after the termination or lapsing of the contract unless the order for the comptometer should have been obtained prior to the termination or lapsing of the contract, provided that the appellant should be allowed sixty days from the termination or lapsing of the contract within which to obtain a binding order from any prospective customer with whom he had previously been negotiating, (6.) to send to the appellant all letters of inquiry from prospective customers received by the company from parties in the territory while the contract was in force, (7.) to pay the salary of one stenographer for the London office, (8.) that although the sub-agents were working for and employed by the appellant, the company would nevertheless pay the employer's contribution imposed by the National Insurance Act, 1911 (Health Insurance for employees), according to the manner and rates in which it was then in effect, (9.) as further consideration to the appellant under the contract the company guaranteed him an income of 50*l.* per month until the expiration of the contract, or until the cancellation of the contract resulting from the appellant not having made the required number of sales or otherwise not performing his obligation under the contract, amounts paid on that guarantee or advanced to the appellant by the company for business expenses payable by him being deducted from commission earned by the appellant, but appellant's income never to be less than 50*l.* per month while the contract was in force, and (10.) that if during the first fourteen months following the date of the contract the appellant should have continually given his whole time and attention to energetically and industriously pushing the sale of the comptometer in the territory to the best of his ability and should have faithfully and truly performed all of his agreements or obligations related in the contract, and if during that period there had been sold in the territory 350 comptometers the appellant's exclusive agency for the comptometers in the territory should be automatically extended for one year longer; and that on similar conditions the contract should from time to time be further extended as therein mentioned on terms mutually satisfactory to the contracting parties. By the agreement the appellant agreed: (1.) that his principal duties would be to sell and manage the selling of comptometers in the territory and to put forth his best endeavours to make the largest possible number of sales there while the contract was in force, (2.) to mail to the company twice each week locations slips showing all changes made in the location of comptometers by or at the direction of the appellant or his agents, to report to the company twice weekly the names and addresses of all parties on whom he or his sub-agents had called with a resumé of what transpired on each call, and to send to the company a monthly machine report, all these reports to be made out on forms furnished by the company and as instructed by the company, (3.) to give his whole time exclusively to energetically and industriously pushing the sale of the comptometers in the territory; if he sold or assisted either directly or indirectly in the sale of any other machine designed for adding or calculating, or for listing or adding or in the sale of any other article or goods, the contract would automatically become null and void, the appellant however was allowed to sell secondhand adding and calculating machines of any make providing such machines were the property of the company, (4.) to exercise his best endeavours to prevent comptometers sold by him or by his sub-agents from being at any time shipped outside of the territory for use in another country, the rule to be among all of the company's sales' agents that as to any comptometer which within six months from the date of its sale was to all intents and purposes in permanent use in another agent's territory, that agent should receive the commission, and the commission received by the agent who sold it should be repaid to the company by that agent who received the order and commission for it in another country or territory, (5.) to take proper care of all comptometers shipped to him or on his order and upon their arrival without delay to remove them to a place of safe storage, and further to keep a correct account of all comptometers shipped to him or on his order, (6.) to maintain at all times during the agreement at his own expense a force of capable well-trained salesmen to a quantity considered sufficient by the company and personally and by the said salesmen regularly canvass at frequent intervals all possible customers in the territory, that force of salesmen to be as many as necessary to work the territory thoroughly in the shortest possible time, but the company not to expect them to be appointed faster than it saw they could be profitably secured, trained and maintained by the appellant, the appellant agreeing to appoint no sub-agent who did not give his whole time and attention to pushing the sale of the comptometers, (7.) to establish and maintain in all large cities of the territory branch offices in charge of competent salesmen thoroughly trained in the operation and selling of the comptometers, these offices to be established as rapidly as possible under energetic management and maintained as the company found they could be profitably maintained by the appellant or his sub-agents, and, when the appellant decided that it would be wise to open an office, to communicate his judgment to the company, and if approved by the company he might rent an office, but not for a term to exceed one year, the company to pay for all office furniture in the offices outside of London, also the office rent, rates and taxes and other office expenses except travelling expenses for the first twelve months after the opening of such office, all such expenses (except of furniture) of each of these sub-offices thereafter to be paid by the agent in charge of it and the company to pay no part of them, the furniture in them which had been paid for by the company to remain their property, (8.) to keep insured against loss and damage by fire and water at the expense of the company all comptometers shipped to the appellant or on his order, (9.) as long as the contract was in force to furnish the company at their expense a good and sufficient annual fidelity bond for 2000*l.*, or any lesser amount as the company might elect, to cover his faithful performance of his agreements in the contract, the bond to be underwritten by a bonding company acceptable by the company, (10.) to see that prompt and efficient repairs were made on all comptometers sold in the territory, all charges for repairing comptometers to be for the account of the company, (11.) to give each customer all the instructions necessary to enable him or his employees to handle all their comptometres skilfully on all their work, (12.) to be responsible for all comptometers shipped by the company into the territory or shipped on the appellant's order after delivery or proffer of delivery to the appellant or to a consignee specified by him, (13.) in case the contract was violated by the appellant he agreed to return to the company within thirty days after receiving demand of the company all unsold comptometers which had been shipped into the territory, and in default of so doing, to pay to the company forthwith the full selling price for each unsold comptometer not so returned, (14.) to duly account for all moneys and securities belonging to the company which should come into his hands in respect of the sale of comptometers or otherwise, and on the same day on which these moneys or securities were received to pay the same to the London bank of the company to the credit of the company's account, the appellant not to draw upon that account for any purpose whatever, (15.) that the company had opened and would keep open while the contract was in force a separate account with the above-mentioned bank in the name of the appellant and the company upon which the appellant should be at liberty to draw for all expenses in relation to the business, (16.) not directly or indirectly or in the form of a rebate to sell a comptometer or offer one for sale either above or below the established selling prices thereinafter given unless instructed to do so by the company, (17.) that on receiving a good valid and bona-fide order for a comptometer from a responsible party, the appellant was in each case to invoice the same to the customer on invoice heads prepared by the company, and on the first mail day following to mail to the company at Chicago a carbon copy which should give the information there mentioned with reference to the sale, the company reserving a right to reject any order not in accordance with their terms and prices, (18.) the appellant agreed to follow the usual rules and regulations of the company as they then existed or as developments necessitated for the protection of the company's interest, or the mutual interest of all the company's agents, but the company agreed to make no rules which would unjustly deprive the appellant of any of his rights under the contract, (19.) the appellant agreed to take care of all comptometers shipped into the territory and upon their arrival there to remove them without delay to a place of safe storage, and further to keep a current account of all comptometers shipped to him or on his order, and (20.) to attend without further remuneration to all matters not directly connected with the selling which were necessary in connection with the carrying on of the business in the territory. By the agreement it was mutually agreed between the parties: (1.) that so long as the customs duties on comptometers into the territory were not more than 10*s*. on each eight-column comptometer, the selling prices of comptometers in the territory were in every case to be as per the schedule of prices which there immediately followed, unless the company gave the appellant notice to the contrary, (2.) that as other models of comptometers were brought out from time to time their prices for sale in the territory would be established by the company, and in case the duty exceeded 10*s*. the price was to be raised sufficiently to take care of such excess duty and also any commission which might be figured on the excess, (3.) that all cheques and papers drawn on other firms to pay for comptometers or other accounts due to the company were to be drawn to the order of the company and to be mailed to their London office in charge of the appellant who would deposit the same to the company in their London bank as further authorized in para. 14, (4.) that every comptometer shipped into the territory by the company should remain the property of the company until a good valid and bona-fide sale thereof had been made to a responsible firm, party, corporation or association, (5.) that if an old comptometer or a machine of another make was taken in part payment of a new comptometer sold, the allowance on the old comptometer was only to be such as was authorized by the company and was not to exceed 5*l*. on a machine of another make, and that in these cases the old machine was the exclusive property of the company and the 30 per cent. commission would be credited to the appellant on the amount of cash received from the transaction, (6.) that wherever in the contract "comptometers" were referred to that was intended to refer only to comptometers manufactured by the company, and commissions were payable only on such as were manufactured by the company, (7.) that the agreement was to be binding on the assigns of the company, and that the appellant agreed not to assign any of his rights under the contract without the consent of the company, (8.) that the lex loci of the contract was that of the State of Illinois and that of the United States of America, and (9.) that everything done under the agreement by the appellant should be performed to the satisfaction of the company subject to the cancellation of the agreement.

In the course of carrying out the agreement the appellant opened offices and carried on business in Kingsway, London, in the name of the company as its general sales agent, but that title or description was afterwards altered to general sales manager. The tenancy of these offices was granted to and held by the company, who paid the rent for them. The company owned all the furniture and the stock-in-trade and goodwill of the business. All sums received for the sale of comptometers were paid into the company's bank account, on which the appellant had no power to draw.

Unless as stated in this case, the appellant had never been in business on his own account, but always in the employment of other persons.

In explanation of the steps which he had taken to carry out the agreement the appellant stated, and the Special Commissioners accepted his evidence, that while in all other respects the terms of the agreement had been strictly complied with, it had never been found possible for him personally to enter into and make upon his own responsibility the contracts with sub-agents contemplated in the agreement, but all contracts of that kind had by arrangement with the company been made and signed by him in the name of the company and on its behalf as its manager or agent, and the accounts kept as between himself and the company had given effect to that arrangement.

The appellant also stated in his evidence that the term "agent," by which he had first been described, had a very wide meaning in the United States, and that it had been altered to manager by the company at his request as the result of a discussion with the Surveyor of Taxes; that he (the appellant) travelled about the United Kingdom to obtain orders, to rent offices, and to buy furniture in each case for the company, and in their name to visit the sub-agents, and generally to superintend the business of the company, that about ten sub-agents for the purpose of the agreement had been appointed in the manner explained, and that all business whatsoever done by the appellant was carried out in the name of the company.

It was contended on behalt of the appellant that the business carried on was the business of the company and not of the appellant, that the appellant did not carry on or own any trade or business, but was employed under a contract of service with the company, and that that employment was exempted from excess profits duty by the Finance (No. 2) Act, 1915, s. 39 (*b*) (1), and did not fall within the latter part of that section; and in the alternative he contended that the appellant was a commercial traveller and entitled to the

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(1) FINANCE (No. 2) ACT, 1915. "*Part III.—Excess Profits Duty.*"

Sect. 38: "(1.) There shall be charged, levied, and paid on the amount by which the profits arising from any trade or business to which this Part of this Act applies, in any accounting period which ended after the fourth day of August nineteen hundred and fourteen, and before the first day of July nineteen hundred and fifteen, exceeded, by more than two hundred pounds, the pre-war standard of profits as defined for the purposes of this Part of this Act a duty (in this Act referred to as 'excess profits duty') of an amount equal to fifty per cent. of that excess.'"

Sect. 39: "The trades and businesses to which this Part of this Act applies are all trades or businesses (whether continuously carried on or not) of any description carried on in the United Kingdom, or owned or carried on in any other place by persons ordinarily resident in the United Kingdom, excepting—

"(*a*) husbandry in the United Kingdom; and

"(*b*) offices or employments; and

"(*c*) any profession the profits of which are dependent mainly on the personal qualifications of the person by whom the profession is carried on and in which no capital expenditure is required, or only capital expenditure of a comparatively small amount,

but including the business of any person taking commissions in respect of any transactions or services rendered, and of any agent of any description (not being a commercial traveller, or an agent whose remuneration consists wholly of a fixed and definite sum not depending on the amount of business done or any other contingency).

Sect. 45: "(2.) The duty may be assessed on any person for the time being owning or carrying on the trade or business or acting as agent for that person in carrying on the trade or business, or, where a trade or business has ceased, on the person who owned or carried on the trade or business or acted as agent in carrying on the trade or business immediately before the time at which the trade or business ceased, and where exemption granted to commercial travellers at the end of the same section.

It was contended on behalf of the respondents that the appellant was chargeable to excess profits duty and was not exempted therefrom by any provision of s. 39.

The Commissioners for Special Purposes were of opinion that the term "agent" of any description in the latter part of s. 39 was wide enough in itself to include a person employed under a contract of employment, and that this was shown by the exemption granted to a commercial traveller, they considered that the plain meaning of the words of the section in which the term occurred required the profits of the appellant to be included, and they read those words not as amplifying since they did not in fact amplify the charge imposed by the

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there has been a change of ownership of the trade or business, the Commissioners of Inland Revenue may, if they think fit, take the accounting period as the period ending on the date on which the ownership has so changed and assess the duty on the person who owned or carried on the trade or business or acted as agent for the person carrying on the trade or business at that date.

"(3.) The amount of duty payable shall be recoverable as a debt due to His Majesty from the person on whom it is assessed. . . . ."

"FOURTH SCHEDULE.

"*Part I.—Computation of Profits.*

"(5). Any deduction allowed for the remuneration of directors, managers, and persons concerned in the management of the trade or business shall not, unless the Commissioners of Inland Revenue, owing to any special circumstances or to the fact that the remuneration of any managers or managing directors depends on the profits of the trade or business, otherwise direct, exceed the sums allowed for those purposes in the last pre-war trade year or a proportionate part thereof as the case requires. . . . ."

FINANCE ACT, 1916.

Sect. 49: "(2.) If as respects any accounting period ending on or after the first day of July nineteen hundred and fifteen, the Commissioners of Inland Revenue refuse to allow a deduction in respect of any increase in the remuneration of directors of any trade or business, and the taxpayer is required to pay excess profits duty in respect of the disallowed deduction, the taxpayer shall be entitled to recover from any such director the amount which the taxpayer has paid by way of excess profits duty in respect of the increase; but any amount so recovered shall, unless the Commissioners otherwise direct, be treated as excess profits duty paid by the director from whom it is recovered and not as excess profits duty paid by the taxpayer.

"(3.) In this section, the expression 'directors' includes any managers or persons concerned in the management of the trade or business who are remunerated out of the funds of the trade or business."

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opening words of the section, but as excluding from the exceptions to that charge certain categories of businesses which would otherwise be included in them, they held that the appellant was not a commercial traveller in the ordinary meaning of the term, and they accordingly confirmed the assessment.

Latter for the appellant. The appellant is not liable in respect of his occupation to excess profits duty under the Finance (No. 2) Act, 1915. By s. 38, sub-s. 1, of that Act (1) the excess profits duty is charged on the profits of any "trade or business" to which the part of the Act relating to the duty applies; and by s. 39 the trades and businesses to which that part of the Act applies are the "trades and businesses" owned or carried on as there mentioned. The occupation of a person who is the whole-time servant of one employer is not a trade or business within the Act. This appears from s. 45 (1), which treats a trade or business as capable of changing ownership and thus as differing in an essential respect from the occupation of a mere servant. The occupation of a whole time servant is not a business in the ordinary sense of the word: *Ramoneur Co., Ld.* v. *Brixey.* (2) In the present case the appellant under the contract between the company and himself is bound to give his whole time to pushing the sale of the company's machines, his remuneration consisting of a commission on the sales. His occupation is thus that of a whole-time servant of the company, and it is therefore not a business within the meaning of the Act.

Even if the occupation of the appellant comes within the expression trades or businesses as defined by s. 39, the appellant is not liable to excess profits duty in respect of it. That section provides that the trades and businesses to which the part of the Act relating to excess profits duty is to apply are all trades and businesses of any description carried on as there mentioned, excepting certain classes of occupation inter alia offices and employments, but including the business of a person taking commissions in respect of any transactions or services rendered and of any agent of any description, not being a

(1) See note (1), ante, p. 59.

(2) (1911) 104 L. T. 809.

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commercial traveller. If the appellant's occupation comes within the general words "trades or businesses" in the first part of that section, it also comes within the exception of "offices and employments" in the next part of the section. It is not excluded from that exception and again brought within the general words by reason of its being included in either of the particular classes of business mentioned in the last part of the section. Being the occupation of a mere servant giving his whole time to the service of his employer, and notwithstanding that the payment is by commission, it cannot properly be said to be the business of a person taking commissions. This case is distinguishable from *Burt & Co.* v. *Inland Revenue Commissioners* (1) where the appellant, not being the servant of one employer only, but acting as agent for many companies from each of which he received a separate commission for sales effected on its behalf, was rightly held to be carrying on an independent business of taking commissions in respect of which he was liable to excess profits duty; and from *Radcliffe* v. *Inland Revenue Commissioners* (2), where the appellant, who acted as manager for several shipping companies on commission, was also held to be carrying on a business of that kind. Nor is the occupation of the appellant the business of an agent of any description. The Special Commissioners were of opinion that that class of business would include the occupation of the appellant, because it would include that of a commercial traveller, as appears from the fact that the latter occupation is expressly excluded from it. The occupation of a commercial traveller, however, who acts for many firms is very different from that of the appellant, who is the whole-time servant of one employer only. A servant is not an agent: *Lamb* v. *Attenborough* (3) and *Reg.* v. *Negus.* (4)

It appears from several of the other provisions of the Act that it cannot be its intention that the occupation of a person in the position of the appellant should be a business in respect of which excess profits duty is chargeable. The Fourth

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(1) [1919] 2 K. B. 650.

(2) (1919) Unreported. May 19, 1919, Rowlatt J.

(3) (1862) 1 B. & S. 831.

(4) (1873) L. R. 2 C. C. 34.

Schedule, Part I., clause 5 (1), provides that the deduction allowed to the owner of a trade or business in respect of the remuneration of directors and managers shall not unless the Commissioners, owing to special circumstances or to the fact that the remuneration depends on the profits, otherwise direct, exceed the sums allowed for those purposes in the last pre-war trade year. Under that clause, where the remuneration of the director or manager exceeds his remuneration of the last pre-war trade year, the owner of the business cannot, unless the Commissioners themselves otherwise direct, make any deduction from his own taxable income in respect of the excess, or, in other words, the owner has to pay the excess profits duty in respect of the excess. If therefore the occupation of the manager were to be treated as a business in respect of which he was chargeable with excess profits duty, the result would be that the duty on his excess remuneration or part of it would be paid twice over, by the owner of the business and also by the manager. Further, the Finance Act, 1916, s. 49, sub-s. 2 (1), provides that if the Commissioners refuse to allow a deduction in respect of any increase in the remuneration of the director and the owner is required to pay duty in respect of the disallowed deduction, the owner shall be entitled to recover from the director the duty which the owner has paid in respect of the increase; and by sub-s. 3 the expression director in that section includes manager. Under that section where the owner of the business has to pay excess profits duty in respect of the increased remuneration of the manager he can recover the amount from the manager. If, therefore, the occupation of the manager were a business in respect of which he was chargeable with excess profits duty, he might have to pay the duty in respect of his increased remuneration twice over, once by direct assessment and again by repayment to the owner of the business, which cannot have been intended. Under the Fourth Schedule, Part I., clause 5, it is in the sole discretion of the Commissioners to determine whether or not any deduction shall be allowed in respect of the increased remuneration, and no appeal lies from their decision: *William-*

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(1) See note (1), ante, p. 59.

son Film Printing Co. v. *Inland Revenue Commissioners* (1), and *Rex* v. *Inland Revenue Commissioners.* (2) In such cases, therefore, the manager's only hope of relief from the double imposition of the duty would depend upon the discretion of those whose function it is to recover as much duty as they can.

In view of these considerations it cannot be supposed that the occupation of a person in the position of the appellant is a business within the meaning of the enactments.

T. H. Parr (*Sir Ernest Pollock S.-G.* with him), for the Commissioners of Inland Revenue, respondents. The appellant is liable to excess profits duty in respect of his occupation under the contract between the company and himself.

The Finance (No. 2) Act, 1915, s. 39, provides that the trades and businesses, to which the part of the Act relating to excess profits duty applies, are all trades or businesses, excepting certain classes of trades and businesses, one of these classes being offices or employments, but including certain specified businesses—namely, that of any person taking commissions in respect of transactions or services rendered, and that of any agent of any description not being a commercial traveller or an agent whose remuneration consists of a fixed and definite sum. That section on its true construction begins by subjecting all trades and businesses in general to the excess profits duty; it next excepts certain classes of trades and businesses such as offices and employments; and it then excludes from the exceptions and restores to the general class of trades and businesses in general the particular businesses of a person taking commissions and an agent of any description with certain exceptions: *Burt & Co.* v. *Inland Revenue Commissioners.* (3)

The occupation of the appellant is that of general manager for the sale in this country of the machines made by a foreign company, his remuneration consisting exclusively of a commission on the prices of the machines sold. That occupation is a "business" within the meaning of the first or charging

(1) [1918] 2 K. B. 720. (2) [1918] 1 K. B. 143.

(3) [1919] 2 K. B. 650.

part of s. 39, and it is not within the exception of offices and employments or any of the other classes of exceptions. If the occupation of the appellant is within any of the classes of exceptions, it comes also within the last part of the section as being either the business of a person taking commissions in respect of services rendered (*Burt & Co.* v. *Inland Revenue Commissioners* (1), and *Radcliffe* v. *Inland Revenue Commissioners* (2)), or as being the business of an agent, and it is therefore exempted from the exceptions and retained within the general category of businesses in respect of which excess profits duty is chargeable.

The assessment of the appellant to excess profits duty would not result, as the appellant apprehends, in the duty or any part of it being charged twice over. The Fourth Schedule, Part I., clause 5, of the Act of 1915, in providing that any deduction from the taxable income of the owner of a business in respect of the remuneration of directors and managers shall not exceed the sums allowed for these purposes in the last pre-war trade year, and thus imposing the duty in respect of the increased remuneration upon the owner of the business, is subject to the qualification that the Commissioners are to have it in their discretion to " otherwise direct " owing to any special circumstances or to the fact that that remuneration depends upon the profits of the trade or business. Under that clause the Commissioners, on finding that a director or manager whose remuneration had increased since the last pre-war trade year was assessed to excess profits duty, would undoubtedly in the exercise of their discretion allow the owner of the business to make such a deduction from his taxable income in respect of the increased remuneration as would prevent the duty or any part of it from being paid by him as well as by the director or manager. That deduction being allowed and the duty not being borne by the owner of the business the latter could recover nothing from the director or manager under s. 49, sub-s. 2, of the Act of 1916, and therefore no part of the duty would be paid by the director or manager twice over.

Latter replied.

(1) [1919] 2 K. B. 650.

(2) Unreported.

ROWLATT J. This is an appeal against an assessment to excess profits duty under the Finance (No. 2) Act, 1915, the ground of the appeal being that the appellant did not own or carry on a " business " within the meaning of s. 39 of the Act. The appellant under a contract between himself and a foreign manufacturing company was bound to give his whole time to selling its machines in this country, his remuneration consisting exclusively of a commission on the prices of the machines sold. His position shortly described was thus that of a whole-time servant of the company. Part III. of the Act is the part relating to the excess profits duty, and s. 39, which is included in that part, provides as follows: "The trades and businesses to which this Part of this Act applies are all trades or businesses (whether continuously carried on or not) of any description carried on in the United Kingdom, or owned or carried on in any other place by persons ordinarily resident in the United Kingdom. . . . ." The section then goes on to make certain exceptions as follows: " excepting—(*a*) husbandry . . . . (*b*) offices or employments; and (*c*)" certain professions. It is to be observed that the first word of that clause is " excepting." It is impossible to read that clause as taking offices and employments out of the section merely by way of explanation that they are not intended to be included in its scope. The fact that the clause begins with the word " excepting " shows that the expression " trades and businesses " in the earlier part of the section must be wide enough to include offices and employments, because these could not be excepted from trades and businesses if they were not first included among them. That I think is the view which was taken of the section by the Court of Appeal in *Burt & Co.* v. *Inland Revenue Commissioners.* (1) Subject to the exception clause the words " trades and businesses " in s. 39 include therefore the occupation of a person holding an office or employment. The question here is whether these words include the occupation of a whole-time servant, which is not an independent occupation but simply that of working for one isolated employer. It may be observed that the business referred to in the section is a business owned or carried on. It seems to me that prima facie a whole-time servant does not own or carry on a business. A business which is capable of being owned or carried on is in the ordinary sense of the word a business which is the adventure of the person who owns it or carries it on.

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(1) [1919] 2 K. B. 650.

In contending that the occupation of the appellant was not a business within the meaning of the Act, his counsel laid great stress upon the Fourth Schedule, Part I., clause 5. That part of that Schedule deals with the computation of profits which are to attract the excess profits duty, and clause 5 provides as follows: "Any deduction allowed for the remuneration of directors, managers, and persons concerned in the management of the trade or business shall not, unless the Commissioners of Inland Revenue, owing to any special circumstances or to the fact that the remuneration of any managers or managing directors depends on the profits of the trade or business, otherwise direct, exceed the sums allowed for those purposes in the last pre-war trade year. . . ." It was pointed out on behalf of the appellant that under that rule the owner of a business on being taxed to excess profits duty may not be allowed to deduct from the profits as an expense of the business the increased remuneration paid to a manager in the position of the appellant, and, if in that case the manager was taxed to that duty in respect of his increased remuneration, there would be a double assessment in respect of the same sum. It was further pointed out that by the Finance Act, 1916, s. 49, sub-s. 2, the owner of the business, on being taxed upon the sum representing that increased remuneration, is entitled to recover from the manager the amount of that duty, so that if in such a case the manager were required to pay directly the duty in respect of his increased remuneration he would be taxed twice in respect of the same subject-matter, and taxed in a sum which equalled that subject-matter in amount, a result involving both injustice and absurdity. It would seem that cases may occur in which that overlapping would take place with that result.

In answer to that it was said by counsel for the respondents, the Commissioners of Inland Revenue, that clause 5, while providing that the deduction allowed in respect of the remuneration of managers shall not be increased, enables the Commissioners to "otherwise direct" in a case where the remuneration of the managers depends on the profits of the trade or business. The rule no doubt gives the Commissioners that power. It leaves it, indeed, entirely to their discretion to decide whether the deduction should be allowed or not; and it certainly seems odd that it should be left in the discretion of a department of the Crown to decide whether a person should or should not be taxed, perhaps at the rate of 100 per cent. of the subject-matter of taxation. Even if the Commissioners possessed all the good will in the world, the discretion thus given to them by the rule would certainly not afford sufficient protection to the manager. Where the assessment of his employer's income is concerned, the manager has no locus standi before the Commissioners to ask that a special deduction shall be allowed to his employer in respect of his own increased remuneration. The manager may never hear that the question has arisen as to the allowance of an increased deduction from his employer's income until the duty in respect of the amount disallowed is sought to be recovered from himself. It may be that the duty has not been remitted within the time permitted by the Statute of Limitations, whatever the time applicable to the particular case may be.

The argument of counsel for the appellant that in view of the provisions of Fourth Schedule, Part I., clause 5, of the Act of 1915, and s. 49 of the Act of 1916, the occupation of a whole-time servant cannot be a trade or business within the meaning of s. 39 of the former Act, in respect of which excess profits duty is directly chargeable, appears to possess considerable force. That argument, however, does not entirely convince me. The Fourth Schedule, Part I., clause 5, would undoubtedly apply in the case of a person whose business involved among other things his holding the position of a director or manager, yet it would not necessarily follow merely because it involved his holding that position, that it was not a business within the meaning of s. 39. It might be that s. 39

would apply to a business of that kind, just as it might apply in the case of a business, an incident of which was the holding of an office or employment, which if it were the sole occupation would be excepted from the section, as, for example, the business of an accountant who happens to hold an auditorship. The difficulty of construing the provisions of the Act would thus remain even if the argument on behalf of the appellant were accepted. In fact, so far as I can see, there is no relation between these two provisions, s. 39, and Fourth Schedule, Part I., clause 5, which makes it possible to limit either of them so as to prevent them from overlapping and to give an entirely reasonable interpretation of them both.

Is there any other consideration which may help one to answer the question whether whole-time service is a business within the meaning of the Act? It seems to me that to a great extent in this Act a "trade or business" is treated as a continuous entity. I do not forget that a few days ago in the case of *Inland Revenue Commissioners* v. *Gittus* (1), in which a question arose as to the application of Fourth Schedule, Part II., clause 5, an argument was addressed to me in favour of a somewhat similar interpretation of the words "trade or business," and that I did not accede to it. The reason was that I thought that if the words were so read in that particular clause it would conflict with other provisions of the Act. It does, however, seem to me that generally speaking the statute proceeds upon the footing that a trade or business is a continuous entity. I may here refer to s. 45, sub-s. 2, which is a very remarkable provision in this connection. [His Lordship read that sub-section, and also sub-s. 3 of the same section. (2)] I was told the other day on behalf of the Crown that sub-s. 2 of that section means that a person carrying on a business at or since the date of the passing of the Act could be assessed to excess profits duty in respect of excess profits earned since the war began not only while he himself owned or carried on the business, but also while it was in the hands of the preceding owners. It must be an unpleasant surprise, even for the person who owns or carries on a business, to find, after he has owned or carried it on for, say, a month in some year since the war began, that he has to pay excess profits duty in respect of profits which have been earned while the business was in the hands of other persons during some antecedent period since August, 1914. It would, however, be an astounding effect of the sub-section that a person in the position of the present appellant whose occupation is that of the mere manager of one business should be charged with excess profits duty in respect of excess profits made by another who had previously held that position on precisely similar terms. It seems unthinkable that the Legislature could have intended that such a liability should be imposed upon a person in that position. The fact that in s. 45 a trade or business owned or carried on is treated as a continuous occupation capable of being transferred from hand to hand and owned by several persons in succession seems to show that the expression "trade or business" as used in the Act cannot refer to the occupation of a mere whole-time servant, but must refer to the occupation of a man who carries on some business which is his own independent business, although it may include some office or employment involving a payment by commission in respect of transactions or services rendered.

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(1) [1919] 2 K. B. 766.

(2) See note (1), ante, p. 59.

It is to be observed that in the case I have put of two or more persons holding in succession the position of whole-time servant, it might be suggested that though the occupation were regarded as a trade or business the person who last occupied the position would not necessarily be charged with duty in respect of the profits of his predecessors, inasmuch as under s. 45, sub-s. 2, the Commissioners might treat the occupation of each of these persons as a business which had ceased, and assess each of them in respect only of his own time. If, however, the occupation were a trade or business at all, it would not be a trade or business which ceased on the retirement of each of these persons, but which changed ownership, one person going out and another coming in on precisely similar terms.

Having given my best consideration to this very confused matter, I have come to the conclusion that the occupation of a whole-time servant is not a "trade or business" owned or carried on by him within the meaning of the Act.

I must therefore allow this appeal with costs.

Solicitors for appellant: *Fraser & Christian.*

Solicitor for respondents: *Solicitor of Inland Revenue.*

J. R.

DODD, APPELLANT v. DODD, RESPONDENT.

1919
Oct. 15.

Husband and Wife—Summary Jurisdiction—Separation Order—Revocation—Revival—Case stated by Justices—Jurisdiction—Summary Jurisdiction (Married Women) Act, 1895 (58 *&* 59 *Vict. c.* 39), *ss.* 7, 11*—Criminal Justice Administration Act,* 1914 (4 *&* 5 *Geo.* 5, *c.* 58), *s.* 30, *sub-s.* 3.

By s. 7 of the Summary Jurisdiction (Married Women) Act, 1895, a Court of summary jurisdiction may at any time "alter, vary, or discharge" an order made by the Court under the Act; and by s. 11 an appeal shall lie from any order under the Act to the Probate, Divorce and Admiralty Division.

By s. 30, sub-s. 3, of the Criminal Justice Administration Act, 1914, any order made by a Court of summary jurisdiction for the periodical payment of money may be "revoked, revived, or varied" by a subsequent order.

Justices, having made an order under the Act of 1895 for separation and for periodical payments by the husband to the wife, subsequently discharged the order on the ground of the wife's adultery. At a later date on fresh evidence the justices made an order revoking the second order and reviving the payments under the original order. The justices stated a case for the opinion of the King's Bench Division on the question whether they had power to revive the original order after it had been discharged:—

Held, that notwithstanding that the power to order the revival of the payments was contained in s. 30, sub-s. 3, of the Act of 1914, and not in the Act of 1895, the justices had no power to state a case, and that the only method by which their decision could be questioned was by an appeal to the Probate, Divorce and Admiralty Division under s. 11 of the Act of 1895.

Manders v. *Manders* [1897] 1 Q. B. 474 followed.

CASE stated by justices for the West Riding of Yorkshire.

An information under the Summary Jurisdiction (Married Women) Act, 1895, was preferred by Alice Dodd, the respondent, against her husband, Charles Dodd, the appellant, for that he had deserted her. The information was heard and determined at a petty sessions on June 19, 1917, when the information was adjudged to be true, and it was ordered that the respondent be no longer bound to cohabit with the appellant, and that the appellant do pay to the respondent 22*s*. every week until the order be altered, varied or discharged, and a further sum for costs.

On February 27, 1919, an information was preferred by the appellant reciting the order of June 19, 1917, and alleging that since the making of that order the respondent had committed an act of adultery, and applying that the order of June 19, 1917, should be discharged. On March 4, 1919, this information was heard, and upon evidence being adduced it was ordered that the order of June 19, 1917, be discharged on the ground that the respondent had committed adultery on February 25, 1919.

On March 18, 1919, an information was preferred by the respondent reciting the orders of June 19, 1917, and March 4, 1919, and applying that the order of June 19, 1917, should be revived on the ground that the respondent had not been guilty of adultery. This information was heard on April 29, 1919, when the information was adjudged to be true, and upon fresh evidence to the satisfaction of the justices being adduced, they ordered that the order of March 4, 1919, be revoked and that the payments under the original order of June 19, 1917, be revived.

It was contended for the appellant that the order of June 19, 1917, having been once discharged by the order of March 4, 1919, the justices had no power to revive it; but it was contended for the respondent, and the justices were of opinion, that they were empowered under s. 30, sub-s. 3, of the Criminal Justice Administration Act, 1914, upon cause being shown and fresh evidence being adduced to their satisfaction, to revive the payments under the order of June 19, 1917. (1)

(1) Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39) s. 7: "A Court of summary jurisdiction acting within the . . . . petty sessional . . . . division . . . . in which any order under this Act . . . has been made, may on the application of the married woman or of her

The question for the opinion of the Court was whether the justices came to a correct determination in point of law in revoking the order of March 4, 1919, and in reviving the payments under the order of June 19, 1917.

Comyns Carr for the respondent. There is a preliminary objection to the hearing of this case. There is no power in a Court of summary jurisdiction to state a case for the opinion of this Court upon a point of law arising on an application for an order under the Summary Jurisdiction (Married Women) Act, 1895. The only method by which the decision of the justices can be questioned is by an appeal to the Probate Divorce and Admiralty Division under s. 11 of the Act of 1895: *Manders* v. *Manders* (1); *Ruther* v. *Ruther*. (2)

Maddocks for the appellant. The order of April 29, 1919, upon which this case was stated, was not made under the Summary Jurisdiction (Married Women) Act, 1895. It is an order revoking the order of March 4, 1919, and reviving the payments under the order of June 19, 1917. Sect. 7 of the Act of 1895 empowers the justices to "alter, vary, or discharge" an order made under that Act, but it does not empower them to revive a previous order. The power to revive an order for payment is derived from s. 30, sub-s. 3, of the Criminal Justice Administration Act, 1914, which provides

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husband, and upon cause being shown upon fresh evidence to the satisfaction of the Court at any time, alter, vary, or discharge any such order. . . . If any married woman upon whose application an order shall have been made under this Act . . . . shall commit an act of adultery, such order shall upon proof thereof be discharged."

Sect. 11: "Save as is hereinbefore provided, an appeal shall lie from any order or the refusal of any order by a Court of summary jurisdiction under this Act to the Probate, Divorce, and Admiralty Division of the High Court of Justice."

Criminal Justice Administration Act, 1914 (4 & 5 Geo. 5, c. 58), s. 30, sub-s. 3: "Any order made either before or after the commencement of this Act by a Court of summary jurisdiction for the periodical payment of money may, upon cause being shown upon fresh evidence to the satisfaction of the Court, be revoked, revived, or varied by a subsequent order."

(1) [1897] 1 Q. B. 474.

(2) [1903] 2 K. B. 270.

that an order by a Court of summary jurisdiction for the periodical payment of money may "be revoked, revived, or varied by a subsequent order." The order in question was made under that section, and the justices therefore had power under s. 33 of the Summary Jurisdiction Act, 1879, to state this case for the opinion of this Court. [He referred to *Williams* v. *Williams* (1) and *Matthews* v. *Matthews*. (2)]

Comyns Carr replied.

EARL OF READING C.J. (after stating the facts). A preliminary objection has been taken on behalf of the respondent that this Court has no jurisdiction to adjudicate upon this case. The objection is based upon the Summary Jurisdiction (Married Women) Act, 1895, which conferred jurisdiction on magistrates to make separation orders. Sect. 11 of that Act provides that an appeal shall lie from any order by a Court of summary jurisdiction under the Act to the Probate, Divorce and Admiralty Division. It is contended on the authority of *Manders* v. *Manders* (3) that the appeal in this case should have been brought to that Division. It is unnecessary to consider in detail the various points which were argued in *Manders* v. *Manders* (3), for this Court is bound to follow the decision. It was there held that a Court of summary jurisdiction has no power to state a case for the opinion of this Court on a point of law arising on an application under the Act of 1895, and that the only remedy is by appeal under s. 11 to the Probate, Divorce and Admiralty Division. But it has been pointed out by counsel for the appellant that the order of the justices of April 29, 1919, on which this case was stated, was not made under the Act of 1895, for it is in part an order reviving a previous order, and although s. 7 of the Act of 1895 empowers justices to "alter, vary, or discharge" an order, it does not empower them to revive a previous order. The power to revive an order for the periodical payment of money is contained in s. 30, sub-s. 3, of the Criminal Justice Administration Act, 1914. The

(1) [1904] P. 145.
(2) [1912] 3 K. B. 91.
(3) [1897] 1 Q. B. 474.

question, therefore, arises whether the fact that jurisdiction to revive an order is only given by s. 30, sub-s. 3, of the Act of 1914 enables an appeal by way of case stated to be brought to this Court. It seems to me that the same reasoning as was applied in *Manders* v. *Manders* (1) would equally apply to an order reviving a previous order. Sect. 30, sub-s. 3, of the Act of 1914 has merely extended the jurisdiction originally conferred on magistrates by the Act of 1895 so as to include in their powers a power to revive an order. Although it is difficult to feel satisfied that the draftsman of the Act of 1914 had in mind the provisions of the Act of 1895, I have come to the conclusion that in truth it was the original jurisdiction conferred by the Act of 1895 which was invoked in these proceedings, but that it is a jurisdiction which has been extended by s. 30, sub-s. 3, of the Act of 1914. That being so, *Manders* v. *Manders* (1) applies, and no appeal lies to this Court. If one were to hold otherwise, very inconvenient results would follow. The order of April 29, 1919, not only revived the payments under the original order, but also revoked, that is to say discharged, the order of March 4, 1919. In so far therefore as it was an order discharging an earlier order, it was clearly made under s. 7 of the Act of 1895, and an appeal against that part of the order would lie only to the Probate, Divorce and Admiralty Division; whereas, if the contention of the appellant is correct, an appeal would also lie to this Court, by a special case, against so much of the order as revived the original order for payment. That would give rise to such an inconvenient state of things that I do not think it can have been intended.

For these reasons I am of opinion that the preliminary objection prevails, and this case must, therefore, be struck out for want of jurisdiction.

AVORY J. If the preliminary objection had to be determined solely on the construction of s. 30, sub-s. 3, of the Criminal Justice Administration Act, 1914, I should unhesitatingly have come to the conclusion that an appeal by case stated lay to this Court. But it has been pointed out that great inconvenience would result if it were to be held that, whereas an appeal from an original order for separation and payment of a periodical allowance lay only to the Probate, Divorce and Admiralty Division, an appeal from an order reviving an original order, and in effect decreeing the same thing, lay to this Court. That would be so unreasonable that I concur in holding that the limitation of the jurisdiction of this Court laid down in *Manders* v. *Manders* (1) still applies to any order which is in effect made under the Act of 1895.

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(1) [1897] 1 Q. B. 474.

SANKEY J. I agree. In my opinion the true effect of s. 30, sub-s. 3, of the Act of 1914, is to enhance the jurisdiction of Courts of summary jurisdiction under the Act of 1895, but not to alter the procedure on appeal therefrom.

Case struck out.

Solicitors for appellant: *Collyer-Bristow & Co., for A. E. Masser, Leeds.*

Solicitor for respondent: *G. A. Herbert, for A. W. Willey, Leeds.*

F. O. R.

1919
Oct. 16.

FRENCH, APPELLANT *v.* CHAMPKIN, RESPONDENT.

Revenue—Carriage—Licence—Exemptions—"Waggon, cart, or other such vehicle"—Vehicle "constructed or adapted for use" and used solely for conveyance of Goods—Ralli Car—Customs and Inland Revenue Act, 1888 (51 *Vict. c.* 8), *s.* 4.

Sect. 4, sub-s. 1, of the Customs and Inland Revenue Act, 1888, requires a licence to be taken out in respect of every carriage.

Sub-s. 3: "In the construction of this section . . . . 'carriage, means and includes any carriage (except a hackney carriage) drawn by a horse or mule, or horses or mules . . . . but shall not include a waggon' cart, or other such vehicle, which is constructed or adapted for use, and is used, solely for the conveyance of any goods . . . . in the course of trade . . . .":—

Held, (1.) that a vehicle to come within the exemption must be of the same genus as a waggon or cart, and (2.) that if not originally constructed solely to be used for the conveyance of goods in the course of trade it must have been adapted—that is, altered in some way in order to make it suitable—for that purpose.

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(1) [1897] 1 Q. B. 474.

A Ralli car not originally constructed for the conveyance of goods or altered so as to make it suitable for that purpose does not come within the exemption, notwithstanding that it is solely used for the conveyance of goods.

Danby v. *Hunter* (1879) 5 Q. B. D. 20 and *Minty* v. *Glew* (1913) 78 J. P. 69 followed.

CASE stated by Luton justices.

The respondent was charged with having unlawfully kept a carriage without having a licence therefor.

The respondent was a dealer in cloth, and held a hawker's licence. He kept a horse-drawn carriage or vehicle of the type known as a Ralli car (1) which was fitted with light shafts and springs, rubber tyres, upholstered seat and rubber footmat, and was very light in build. There was nothing in the construction or appearance of the car to distinguish it from a Ralli car used for purposes other than that of the conveyance of goods in the course of trade. The car was used by the respondent solely in the course of his trade as a dealer and hawker, and was suitable for that purpose, but was not specially constructed, nor had it been structurally altered or added to, for that purpose. The respondent's name and place of abode or business were printed on a metal strip or flap suspended underneath the shafts, or forepart of the car, in letters of the requisite size.

The justices were of opinion that the car being suitable for use, and being in fact used, by the respondent solely for the conveyance of his goods in the course of his trade, was adapted for such use, and was not a "carriage" within the definition in s. 4, sub-s. 3, of the Customs and Inland Revenue Act, 1888; they accordingly dismissed the information.

H. J. Rowlands for the appellant. The justices were wrong in holding that the respondent's Ralli car was not a "carriage"

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(1) In the Oxford English Dictionary a "Ralli car" is explained as being a form of light two-wheeled driving-trap for four persons, introduced in 1885 and named after the first purchaser.

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within s. 4, sub-s. 3, of the Customs and Inland Revenue Act, 1888. The sub-section exempts from the duty upon carriages a "waggon, cart, or other such vehicle, which is constructed or adapted for use, and is used, solely for the conveyance of any goods. . . . in the course of trade." A Ralli car does not come within that exemption. First, it is not a vehicle ejusdem generis with waggons and carts (*Danby* v. *Hunter* (1)), which was decided on very similar words in s. 76 of the Highway Act, 1835. Secondly, a Ralli car is not a vehicle "constructed or adapted for use and . . . . used solely for the conveyance of goods" etc. The word "solely" must be read with both branches of the sentence and be understood as limiting the construction or adaptation of the vehicle as well as the use: *Moore* v. *Lewis.* (2) In this case the Ralli car was not solely constructed or adapted for the exempted purpose. It certainly was not constructed for the conveyance of goods, nor has it been "adapted" for that purpose, inasmuch as the word "adapted" means, not what the justices thought it meant, namely, suitable for the conveyance of goods, but altered so as to be made apt or suitable for that purpose: *Minty* v. *Glew.* (3) *Cook* v. *Hobbs* (4) which was relied upon by the respondent before the justices does not touch the present case. It merely decided that if a vehicle has been constructed with a view to its being used solely for the exempted purpose, the mere fact that it is capable of being used for other purposes will not deprive it of the exemption. [*Strutt* v. *Clift* (5) was also referred to.]

The respondent was not represented.

EARL OF READING C.J. In view of the conclusion of law at which we have arrived this case must be remitted to the justices for them to convict the respondent.

On the first point I come to the conclusion that the words "or other such vehicle" in s. 4, sub-s. 3, of the Customs and Inland Revenue Act, 1888, must be construed as ejusdem generis with the words "waggon" and "cart"; and that the sub-section does not apply to exempt a Ralli car which is not a vehicle of the same genus as a waggon or cart.

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(1) 5 Q. B. D. 20.
(2) [1906] 1 K. B. 27.
(3) 78 J. P. 69.
(4) [1911] 1 K. B. 14.
(5) [1911] 1 K. B. 1.

Support for this view is to be found in *Danby* v. *Hunter*. (1) The words in question there were "waggon, cart, or other such carriage" as used in s. 76 of the Highway Act, 1835, and it was held that the words "cart or . . . . carriage" were to be construed as ejusdem generis with waggon.

The second point taken is that the justices have not properly construed the word "adapted" in the same sub-section, or the succeeding words "used solely for the conveyance of any goods . . . . in the course of trade." The justices seem to have treated the word "adapted" as if it were synonymous with "suitable" or "apt," whereas it must be construed as meaning altered so as to make the vehicle apt for the conveyance of goods. The words are intended to cover the case of a vehicle which was not constructed solely for the purpose of conveying goods in the course of trade, but after its construction has been made apt for that purpose. If the vehicle has not been originally constructed for the conveyance of goods it is still entitled to exemption if by some alteration it has been made suitable for the purpose mentioned. In this case the Ralli car had not been altered in any way, but it was thought by the justices to be a vehicle which could be suitably used for the purpose of trade as described in the sub-section. It was not constructed for that purpose, and as it had not been altered so as to be made suitable for that purpose, the justices were wrong.

The authorities support the view we are now taking. In *Moore* v. *Lewis* (2) it was decided that the words "constructed or adapted . . . . for the conveyance of any goods" confined the exemption to a vehicle solely constructed or adapted for that purpose. That decision shows that "constructed or adapted for use" must be read in conjunction with the word "solely" which does not apply merely to the words "and is used." In *Cook* v. *Hobbs* (3) the same meaning was given

(1) 5 Q. B. D. 20.
(2) [1906] 1 K. B. 27.
(3) [1911] 1 K. B. 14.

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to the words as in *Moore* v. *Lewis* (1), and the Court also held that the fact that a vehicle was used not only for the purpose of taking goods to market but also for carrying certain persons along with the goods did not take away the title to exemption from the tax. *Minty* v. *Glew* (2) makes it plain that the word "adapted" is not translatable into the word "suitable," but means that the vehicle has been so altered as to make it apt for the conveyance of goods.

AVORY J. I agree that this Ralli car was not a "waggon, cart or other such vehicle" within the meaning of the sub-section. I also agree with what the Lord Chief Justice has said as to the meaning of the words "constructed or adapted," and I therefore think that the justices acted upon a wrong view. They thought that because the vehicle was used solely for the conveyance of goods it came within the exemption. That, however, is not sufficient to exempt it.

SANKEY J. I agree. The words "constructed" and "adapted" are verbs, whereas the justices read the first of these words as a verb and the second as an adjective and as meaning "adaptable."

Appeal allowed.

Solicitors for appellant: *F. Venn & Co., for W. W. Marks, Bedford.*

J. S. H.

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(1) [1906] 1 K. B. 27.

(2) 78 J. P. 69.

YOUNG *v.* LADIES' IMPERIAL CLUB, LIMITED.

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Nov. 13, 14.

Club—Expulsion of Member—Resolution of Committee—Validity—Constitution of Committee.

One of the rules of a proprietary club provided that if the conduct of any member should in the opinion of the executive committee be injurious to the character and interests of the club the committee should have the power to suspend the member from the use of the club and to recommend her to resign, and if the member did not resign within a certain time, the committee should erase her name from the list of members, provided that no member could be so suspended or recommended to resign unless a resolution to that effect should have been passed by a certain majority of the members of the committee actually present at a meeting specially convened for the purpose.

Acting under the above rule the committee of the defendant club recommended the plaintiff to resign membership of the club, and, as she did not do so, the committee erased her name from the list of members. The notice calling the meeting of committee stated that the object was "to report on and discuss the matter concerning [the plaintiff] and Mrs. L.," and it was sent to each member of the committee except one who had previously intimated that owing to frequent absences and various calls upon her time she would be unable to attend meetings of the committee:—

Held, (1.) that the notice stated the object of the meeting with sufficient particularity; and (2.) that the member of committee to whom notice was not sent was, in view of her intimation of inability to attend meetings, not a summonable member, and therefore that the omission to send notice to her did not invalidate the proceedings of the committee.

Opinion of Lord Romilly in *Richardson-Gardner* v. *Fremantle* (1870) 24 L. T. 81, 86 applied.

Where nothing has been done by a club which is contrary to natural justice, and where its rules have been substantially adhered to, the Court will not be so meticulous in scrutinising its acts in regard to formalities and technicalities as it will be in dealing with the proceedings of a business company.

Observation of Cotton L.J. in *Dawson* v. *Antrobus* (1881) 17 Ch. D. 615, 636 applied.

ACTION tried by Roche J.

The plaintiff claimed (1.) an injunction to restrain the defendants from suspending her from membership of the club and from erasing her name from the list of members; (2.) a declaration that she was still a member of the club; and (3.) damages.

Owing to certain charges which the plaintiff had made against another member of the club, she received notice from the executive committee to attend and explain her conduct. She did not attend either then or on a subsequent date when she was again asked to attend. Thereupon a notice was issued convening a special meeting of the executive committee for May 2, 1918. This notice (which intimated that the object of the meeting was "to report on and discuss the matter concerning Mrs. Young [i.e., the plaintiff] and Mrs. L.") was sent to each member of the executive committee except the Duchess of Abercorn, with regard to whom evidence was given that she had intimated some time earlier that, owing to frequent absences and various calls upon her time, she would be unable to attend committee meetings. The Duchess had not, in fact, attended any meetings of the executive committee.

Rule 42 of the club rules provided that "if the conduct of any member, either in or out of the club house, shall in the opinion of the executive committee . . . . be injurious to the character and interests of the club, the committee shall have the power at once to suspend such member from the use of the club and to recommend her to resign. If such member shall not resign within a month after notice of such recommendation has been given to her, the committee shall erase her name from the list of members, and the person whose name is so erased shall cease to be a member of the club. Provided that no member can be so suspended or recommended to resign unless a resolution to that effect shall have been passed by a majority of at least two-thirds of the members of the committee actually present at a meeting specially convened for the purpose. . . . "

On May 2, 1918, the executive committee met, and, acting under the above rule, unanimously passed a resolution that the plaintiff be asked to resign, and that a letter be written to her to that effect. As the plaintiff did not resign within a month of the notice to her of the said recommendation, the executive committee on June 4, 1918, erased her name from the list of members, and a letter was written to her informing her that she had ceased to be a member of the club.

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Sir Edward Marshall-Hall K.C. and *Jowitt* for the plaintiff. The power of expelling a member from a club must be exercised in strict conformity with the rules by which it is given, otherwise the purported expulsion will be inoperative: Halsbury's Laws of England, vol. iv., p. 415. In this case the rules were not complied with. First, no notice of the meeting of the executive committee was given to the Duchess of Abercorn, one of the members. It was essential that all the members entitled to attend should have been notified (*Smyth* v. *Darley* (1); *Labouchere* v. *Earl Wharncliffe* (2); Palmer's Company Law, 10th ed., p. 166); and the omission to summon anyone entitled to attend invalidates the proceedings of the committee: *Smyth* v. *Darley*. (1) It will be said, however, that in view of the intimation given by the Duchess of Abercorn that she would be unable to attend meetings of the executive committee it was unnecessary to send notice to her. That contention is based on a misconception of the position of a member of a committee. A member of committee has duties to perform and is not entitled to decline to perform them. If the Duchess of Abercorn had been notified of the meeting it is quite possible that she might have attended, and the result might conceivably have been different. Secondly, the notice convening the meeting was bad in not stating with sufficient particularity the object of the meeting. Rule 42 requires that the meeting of the executive committee must be specially convened "for the purpose"—i.e., for considering whether the person whose conduct is impugned should be suspended from membership and recommended to resign. The notice in fact sent merely stated that the meeting was "to report on and discuss the matter concerning Mrs. Young and Mrs. L." That does not sufficiently specify the purpose of the meeting: see *Kaye* v. *Croydon Tramways Co.* (3) The rules not having been complied with the plaintiff is entitled to the relief claimed: *Fisher* v. *Keane* (4); *Labouchere* v. *Earl Wharncliffe* (5); *Dawkins* v. *Antrobus* (6.) [They also contended that the meeting of the executive committee was irregular in other respects, but this does not call for a report.]

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(1) (1849) 2 H. L. C. 789.

(2) (1879) 13 Ch. D. 346, 353.

(3) [1898] 1 Ch. 358.

(4) (1878) 11 Ch. D. 353.

(5) 13 Ch. D. 346.

(6) 17 Ch. D. 615.

Sir Ellis Hume-Williams K.C. and *G. A. Scott* for the defendants. In the case of a proprietary club, which is the case here, a member who has been expelled by the committee cannot obtain relief by way of injunction, even although the proceedings may have been irregular, but will be left to his remedy in damages: *Baird* v. *Wells.* (1)

[ROCHE J. I am concerned with the technical point as to the non-summoning of one member of the executive committee.]

There has been a substantial compliance with the rule requiring the summoning of members of the executive committee. In *Smyth* v. *Darley* (2) Lord Campbell, while stating that the general rule was that in the case of an electoral body all entitled to be present must have notice of the meeting, added "unless those not summoned were beyond summoning distance—as, for instance, abroad." There are, therefore, exceptions to the general rule. In this case the intimation given by the Duchess that she would be unable to attend committee meetings was a justifiable excuse for not serving her with notice. The form of sending notice to a person who it is known will not attend need not be gone through. Where there has been a fair and honest exercise by a club of the power conferred by its rules, the Court will not interfere with the exercise of that power merely because something was not done in a formal way: see per Cotton L.J. in *Dawkins* v. *Antrobus.* (3) With regard to the point that the object of the meeting was insufficiently stated, *Kaye* v. *Croydon Tramways Co.* (4), cited in support of the contention, has no bearing, as in that case there was the non-disclosure of an important provision in favour of the directors. On the other hand, *Richardson-Gardner* v. *Fremantle* (5) is a direct authority in the defendants' favour. That was a club case, and the notice of the meeting stated its object thus: "Mr. Gardner's Case." Lord Romilly held that to be sufficient, because "most of the members of

(1) (1890) 44 Ch. D. 661.

(2) 2 H. L. C. 789, 803.

(3) 17 Ch. D. 615, 636.

(4) [1898] 1 Ch. 358.

(5) 24 L. T. 81, 86.

the committee knew what it was about." The rules having thus been complied with the plaintiff is not entitled to relief in any form.

Sir Edward Marshall-Hall K.C. in reply. In view of the decision in *Baird* v. *Wells* (1) we cannot contend in this Court that the plaintiff is entitled to an injunction, but by reason of the non-compliance with the rules in not summoning the Duchess of Abercorn to attend the executive committee's meeting, the plaintiff is entitled to the other relief claimed.

Roche J. In this case the plaintiff claims an injunction, a declaration and damages. She complains that she was wrongfully excluded from the club and her name erased from the list of members. The claim for an injunction has now been abandoned, it being conceded that, in view of the decision in *Baird* v. *Wells* (1), the Court will not grant an injunction where a person has been excluded from a proprietary club, which this is. But apart from that decision, I should not, in the circumstances of this case, have granted an injunction, nor should I grant a declaration. It remains to see whether the plaintiff is entitled to damages.

The plaintiff was requested to resign her membership of the club; she declined to do so, and her name was taken off the list of members by the committee on the ground that she had been guilty of conduct injurious to the character and interests of the club. It is not said that her personal behaviour had been disgraceful, but in view of certain charges made by her against another member, the committee considered that she was unfit to continue a member of the club. Before that decision was arrived at she was asked, at least twice, to attend meetings of the committee to explain her conduct, but she did not avail herself of these opportunities, so that it was at least intelligible, I may almost say inevitable, that the committee took the course it did. It is now contended that the action of the committee is bad on certain technical grounds. It is said that the executive committee was not properly elected, was not sufficient in number, and was not properly summoned. I am not satisfied that the committee was not properly elected, nor that in number it was not sufficient. With regard to the notice summoning the meeting I expressed during the argument my opinion that the agenda was sufficiently stated, and I am happy to find that the view I then formed is supported by the opinion expressed by Lord Romilly in *Richardson-Gardner* v. *Fremantle*. (1)

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(1) 44 Ch. D. 661.

There remains to be considered the one substantial point in the case, namely, whether the committee was properly summoned. One lady whose name appears in the list of the executive committee was not summoned to attend the meeting. No doubt it is important that when a serious step is proposed to be taken all members of the committee should be given an opportunity of attending. Rule 42 of the club rules says that the meeting shall be specially convened for the purpose. That would generally involve notice being sent to all the members of the committee. But there are exceptions to this general rule. If for instance a member is known to be seriously ill it would not be reasonable or necessary to require that notice should be sent to her. In *Smyth* v. *Darley* (2) the absence, beyond summoning distance, of a person entitled to attend a meeting, was considered to be a good reason for not summoning him. In this case I have evidence, which I accept, that the Duchess of Abercorn had expressed a wish to resign, but on being pressed to continue a member of the executive committee had agreed to do so, intimating, however, at the same time that owing to frequent absences and various calls upon her time, she would be unable to attend meetings. It was for that reason that no notice was sent to her of the meeting in question. I think she was not a summonable member of committee, that is, not a member to whom notice of the meeting was required to be sent. I hold therefore that the meeting was properly convened, notwithstanding the absence of notice to the Duchess of Abercorn. That disposes of the case, but I desire to add that where nothing has been done contrary to natural justice and where there has been a substantial adherence to the rules I ought not, in dealing with a club,

(1) 24 L. T. 81, 86. (2) 2 H. L. C. 789.

to be so meticulous in scrutinising the acts of the committee in regard to formalities and technicalities as I should be in dealing with the proceedings of a business company. In *Dawkins* v. *Antrobus* (1) Cotton L.J. said: "It was urged that the resolution was informal, that it was not put in a proper way. If it were a fair and honest exercise of the power conferred by the rule, I think that we have no right to interfere with the exercise of the power simply because something was not put in the formal way that might have been required upon demurrer." I adopt that view, and, applying it to the present case, where it is not suggested that anything has been done contrary to natural justice, I am unable to hold that there has been such an informality in the proceedings as entitles the plaintiff to question the resolution calling upon her to resign. The action therefore fails and must be dismissed with costs.

I may add that if the case goes further and the Court of Appeal, taking a different view with regard to the rules, should hold that the plaintiff is entitled to damages, I assess these at one farthing.

Judgment for defendants.

Solicitors for plaintiff: *Wingfield & Blew.*
Solicitors for defendants: *Kirby, Millett & Ayscough.*

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(1) 17 Ch. D. 615, 636.

J. S. H.

C. A.

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June 26;

July 9.

[IN THE COURT OF APPEAL.]

LING *v.* DE DION BOUTON.

Employer and Workman—Compensation—Injury by Accident—Partial Incapacity—Principle of Assessment —"Suitable Employment"—Wage-earning Capacity before Accident—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I., cl.* (1) (*b*); *cl.* (3).

The applicant, a woman, was injured by accident whilst employed as a machinist in the respondent's munition works. Her average weekly earnings in that employment were 4*l.* 8*s.* 8*d.* Before the war she was a cook-housekeeper, earning 55*l.* a year. After the accident she resumed that occupation at a wage of 1*l.* a week, and expressed her intention of not returning to munition work. As a result of the accident she was partially incapacited for munition work, but the county court judge found that she was under no incapacity for work as a cook. He held that as she did not intend to resume munition work the question of her capacity for that employment did not arise, and, the respondents admitting liability, he made no award for compensation:—

Held, on appeal, that the judge had proceeded on a wrong principle. He had measured the wage-earning capacity of the applicant at the date of the accident, not by her average weekly earnings in her then employment, but by considering what she would have earned in a previous employment. That consideration was irrelevant.

Appeal from an award of the judge of the Barnet County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

The applicant, Ada Ling, before the war was engaged as a cook-housekeeper earning 55*l.* a year with board and lodging. On February 28, 1916, she entered the employment of the respondents, munition manufacturers, as a lathe worker. On September 11, 1916, while engaged in turning and gauging shells she met with an accident resulting in an injury to her hand and the permanent shortening of her right thumb, and loss of grip. At the date of the accident her average weekly earnings with the respondents were 4*l.* 8*s.* 8*d.* After the accident, when she was sufficiently recovered, she resumed her former occupation, and obtained a situation as temporary cook at 20*s.* a week with board and lodging. At the hearing of the arbitration she expressed her intention of not returning to munition work. There was evidence that owing to her injury she could not now do work similar to shell turning, and that she was to some extent handicapped in her work as a cook.

The county court judge found that the injury to her hand did not justify an inference that her earning capacity as a cook or cook-housekeeper was reduced, and he held that the question of her capacity as a lathe worker did not arise, as she had no intention or desire to resume such work and had made no attempt to obtain it. On these findings, the respondents submitting to a declaration of liability, the judge awarded no compensation. The applicant appealed.

Harold Morris and *Beresford* for the appellant. The county court judge has proceeded upon a wrong principle. He has not taken into consideration the relevant matters—namely, the average weekly earnings of the workman before the accident and the average weekly amount which she is now earning or is able to earn in suitable employment. He has found that she is able to do her former work as a cook, and because she has intimated her intention of not returning to munition work he has declined to consider the question whether she is incapacitated for that class of work. If a workman after an accident is bona fide employed in some suitable employment the amount which he so earns is prima facie the measure of what he is able to earn: *Heathcote* v. *Haunchwood Collieries*. (1) It is for those who allege that the workman is not acting bona fide—that he is taking less than he could get—to prove it. The learned judge has not properly decided this case and it should be remitted to him.

Doughty for the respondents. Within the limits laid down by the Act the arbitrator has exercised his discretion. He is not bound to award anything. He has assessed the compensation having regard to all the circumstances.

[WARRINGTON L.J. He has not properly considered the loss of earning capacity.]

Abbey v. *Nicholls & Sons*. (2)

(1) [1918] A. C. 52.

(2) (1919) 12 B. W. C. C. 64.

[DUKE L.J. That case went entirely upon the want of evidence.]

Swinfen Eady M.R. at the end of his judgment deals with the point which I desire to make.

It would be idle to consider what a workman might earn in an occupation which he has no intention of engaging in. That intention is a matter which the judge may properly consider, and if he has done so this Court will not interfere.

Harold Morris in reply. In *Abbey Nicholls & Sons* (1) the applicant had to prove the amount which she would have been able to earn if she had not been injured and she failed to give evidence as to that. If the respondents are right in their contention then the test is whether the applicant intends to resume her former occupation. That is not the test. The county court judge did not make the proper comparison at all. He has not considered the relevant matters.

[He also referred to *McNally* v. *Furness, Withy & Co.* (2); *Cargo Fleet Iron Co.* v. *Funck* (3); *Harwood* v. *Wyken Colliery Co.* (4)]

July 9. WARRINGTON L.J. (after stating the facts). The ground of appeal resolves itself into this, that the judge has arrived at the result by comparing the appellant's present wage-earning capacity, not with her wage-earning capacity as measured by her earnings while in the respondents' employ, but with her capacity in a previous employment. The county court judge has in effect treated her as having been a cook throughout and on this has held that as in his opinion her wage-earning capacity as a cook has not been diminished she is not entitled to compensation. In my opinion in so treating the matter the judge has misconceived his duty under the Act. As the case is going for a new hearing I say nothing as to his finding of fact, because, if it be material, I desire to leave it entirely open.

The liability to pay compensation arises from the fact that the workman was at the date of the accident in a par-

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(1) (1919) 12 B. W. C. C. 64.

(2) (1913) 6 B. W. C. C. 664.

(3) (1916) 9 B. W. C. C. 318.

(4) [1913] 2 K. B. 158.

Warrington L.J.

ticular employment and suffered injury by accident arising out of and in the course of that employment. Then the measure of the compensation is the diminution of the wage-earning capacity in consequence of the injury. See *Harwood* v. *Wyken Colliery Co.* (1) How is the wage-earning capacity previous to the injury, the diminution of which is the subject of compensation, to be measured in terms of money? I think having regard to Sched. I., cl. (1.) (*b*), and to clause (3), the answer must be by the average weekly earnings during the twelve months preceding the accident.

How is the diminution to be measured? The answer is, having regard to clause (3) by a comparison of the capacity previous to the injury, measured as above mentioned, with the capacity after the injury measured by the amount which the workman is then earning or is able to earn. See *Heathcote* v. *Haunchwood Collieries.* (2)

Then having the two limbs of the comparison, and having ascertained the money difference in the workman's capacity at the two dates, the duty of the judge is to determine the relation which the compensation should properly bear to that difference under the circumstances of the case. For the purpose of arriving at this relation circumstances such as a change in the labour market and similar circumstances may be taken into account.

If I am right in the meaning and effect thus given to the provisions of the Act I think it is clear that the judge's mode of dealing with the case is wrong, for he has measured the wage-earning capacity at the date of the accident, not by the applicant's average weekly earnings during her then employment, but by what she might have earned in a previous employment.

I think the consideration of her previous employment was irrelevant for the purpose for which the judge employed it. His award must be set aside and the matter remitted for adjudication on proper grounds. The appeal must be allowed with costs, and the costs of the previous hearing should be dealt with by the judge who hears the remitted application.

(1) [1913] 2 K. B. 158. (2) [1918] A. C. 52.

DUKE L.J. The appellant in this case complains of the award made by the learned judge of the Barnet County Court on the ground that it is not an award made in accordance with the requirements of the Workmen's Compensation Act, 1906. She was before the war a skilled cook and housekeeper earning 55*l.* a year and her board and lodging. During the war she became a munition worker and acquired such proficiency at the lathe that in the twelve months before the accident which caused the injury in question she earned an average wage of 4*l.* 8*s.* 8*d.* a week. The accident injured one of her thumbs so as to cause apparent partial disability for work at the lathe. After being for some time under treatment the appellant returned to her former occupation and obtained employment at 52*l.* a year with board and lodging but could not as she said do some of the necessary work so well as she had done before suffering the injury to her thumb. She made no attempt again to obtain mechanical work and stated that she had no intention of resuming it. She claimed an award of a weekly payment for partial disability. The respondents while submitting to a declaration of liability denied the appellant's right to a weekly payment. The learned judge decided in their favour and ordered the applicant to pay their costs.

The applicant, a " workman " within the meaning of the Workmen's Compensation Act, 1906, had suffered injury by accident during and in the course of her employment. It was not disputed that for some time after the accident she was disabled from following that employment. She claimed to be entitled to prove in the county court that she was still so disabled, wholly or partially, and upon proof of that fact to have an award of a weekly payment during the continuance of such disability by way of compensation. Sect. 1 of the Act and s. 1 of the First Schedule declare in unambiguous language the right of the workman totally or partially incapacitated by injury to have an award of compensation upon the statutory terms and within the statutory limits. The qualifying fact is total or partial incapacity due to injury suffered in the employment. The limits upon the award of a weekly payment are: (1.) 50 per cent. of the average weekly earnings; (2.) 1*l.* per week; and (3.) in case of partial incapacity (which is the present case) "the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident." The limitations as to amount are cumulative. When an amount has been arrived at in accordance with the prescribed limitations the arbitrator is directed to award a weekly payment which shall bear such relation to that amount "as under the circumstances of the case may appear proper."

In the present case the average weekly earnings of the applicant before the accident are known to have been 4*l.* 8*s.* 8*d.* The amount she is earning is capable of computation and appears to have been thought by the learned arbitrator to be the amount the applicant could earn as a cook-housekeeper.

If the applicant's earnings as cook-housekeeper were the amount she could earn in a suitable employment the maximum amount of the weekly payment which could be awarded her having regard to the several statutory limitations would appear to be 1*l.* a week. To that amount the arbitrator is to direct his attention. The learned arbitrator in the present case did not so deal with the matter. He made two findings of fact: (1.) that the applicant is under no incapacity for work as a cook-housekeeper; and (2.) that she has no intention of returning to work at the lathe; and concluded upon these findings that it was immaterial whether the applicant was or was not incapacitated by her injury from earning the wages of a lathe worker to the extent to which she was able to earn such wages before the injury. The effect of the decision of the learned judge, as I understand it, is that where after an accident causing incapacity an injured workman voluntarily determines not to resume work in the class of employment in which the accident occurred, his total or partial incapacity for that employment is not incapacity for which compensation is to be awarded under the Act. In my opinion this is an erroneous view. There is a proper statutory effect of the workman's change of employment but it is not that of forfeiture of the right to an award. If the workman is a claimant for compensation he must claim upon the footing that he earns what he can. If in a suitable employment of business he can earn as much as he earned before the accident he is not entitled to an award of a weekly payment. If by reason of injury he cannot, he suffers an incapacity and the statute entitles him to have the degree of that incapacity ascertained. Within the limits fixed by the statute the arbitrator is to decide what is to be the amount of the compensation for the incapacity. Lord Dunedin deals with the matter in *Woodilee Coal and Coke Co.* v. *M'Neill.* (1) "Supposing there had been no provisions as to cutting down by prescribing the maximum, the compensation would obviously have been a payment which should make up to the man for the fact that he is an injured man instead of a whole man. As a whole man he would have been able to earn so much at this moment; as an injured man he can only earn so much; and the difference is the compensation." The discretion to be exercised by the arbitrator in determining the relation between the statutory maximum and the amount proper to be awarded is governed by the express provision of the Act that the workman shall be compensated for incapacity. As was pointed out by Lord Moulton in *Bevan* v. *Energlyn Colliery Co.* (2), "proper" in the concluding words of cl. (3) of Sched. I., means proper for the ascertainment of compensation for the injury in question.

The circumstances of the case which are proper to be taken into account in the determination of the weekly payment required to be awarded for compensation are not capable of being stated in a schedule. They are defined, however, as "the circumstances of the case" and not as "the circumstances of the applicant." The fact that an applicant is undergoing a long term of imprisonment does not disentitle him to an award: *McNally* v. *Furness, Withy & Co.* (3) The fact that some new and independent cause of total or partial incapacity

(1) [1918] A. C. 43.
(2) [1912] 1 K. B. 63, 71.
(3) 6 B. W. C. C. 664.

has supervened upon the disability caused by the accident does not relieve the employer of liability: *Harwood* v. *Wyken Colliery Co.*(1) On the other hand a change of the ruling rates of remuneration in the industry in which the workman could have earned his old rate of wages is a circumstance which the arbitrator may consider in fixing the weekly payment for compensation. If wages have definitely fallen to a lower rate the employer may, under the discretion of the arbitrator, secure a lower award: *Bevan* v. *Energlyn Colliery Co.* (2), or if wages have definitely risen the workman may get the advantage in a higher award: *Woodilee Coal and Coke Co.* v. *M'Neill.* (3)

What is complained of in the present case is that the statutory process has not been pursued. The arbitrator has not ascertained whether the applicant is incapacitated, or in what degree she is incapacitated, from earning the wages which she could have earned as a mechanical worker. Assuming that she suffers any such incapacity, he has not ascertained the statutory limits within which compensation by way of weekly payment could be awarded to her. Nor has he determined what weekly payment in the circumstances of the case would be properly awarded to her as compensation for her alleged loss of earning capacity. The case has difficulties of its own, in the character of the industry in which the applicant suffered her injury and in the position she occupied or could occupy as a worker in that industry, or an industry of like character. These may have to be considered if and when the amount of a weekly payment comes to be determined. The applicant, however, is entitled to have her claim to have some compensation dealt with in accordance with the statute, and the appeal ought therefore to be allowed.

ATKIN L.J. This was a claim for compensation for injury causing partial incapacity. I desire to state shortly what in my opinion are the rules indicated by statute and judicial decisions for guiding the arbitrator in assessing such compensation.

(1) [1913] 2 K. B. 158. (2) [1912] 1 K. B. 63.
(3) [1918] A. C. 43.

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Atkin L.J.

In the first place there are limits to the amount of the compensation.

1. It must not exceed 50 per cent. of the average weekly earnings of the workman during the previous 12 months. Sched. I. (1.) (*b*).

2. It must not exceed 1*l.* (Ibid.)

3. It must not exceed the difference between

   (*a.*) The average weekly earnings before the accident.

   (*b*). The average amount he is earning or able to earn in suitable employment after the accident. (Sched. I. (3))

These limits are merely arithmetical boundary posts. They do not guide to the amount of compensation that has to be fixed within the limits. The only guidance given by the Act is that the amount is to bear such relation to the amount of the difference indicated in (3.) above as under the circumstances may seem proper. "Is to bear such relation" means arithmetical relation. Subject to the limits referred to in (2.) above, it may be equal to or less than the difference.

What then are the rules to determine what amount under the circumstances is proper ? The statute is silent. Guidance has to be obtained from decided cases.

1. The compensation is to be for loss of power to earn caused by the accident: *Woodilee Coal and Coke Co.* v. *M'Neill.* (1)

2. In estimating such loss of power to earn, or earning capacity, it is relevant to consider what the workman would have earned but for the accident. Wages may have gone up since the accident. The injured workman may in consequence of the rise in wages be earning or be capable of earning as much or more than he earned before the accident: and yet such earnings may be less than what he would have earned but for the accident. The difference may be the money measure of his loss of earning capacity. This is the decision in *Woodilee Coal and Coke Co.* v. *M'Neill.* (2) It follows that the arbitrator may also take into account a fall in wages: *Bevan* v. *Energlyn Colliery Co.* (3) Whether he may also take into account the

(1) [1918] A. C. 50.

(2) [1918] A. C. 46, 48, 50.

(3) [1912] 1 K. B. 63.

disappearance of that industry at those wages for that class of workman, as for instance where restrictive customs in an industry are temporarily suspended and afterwards restored, is a matter which I would desire at present to leave open.

It is to be noted that such rise and fall of wages are relevant only to the fixing of compensation for loss of earning power within the limits. They have no relevance in fixing the limits themselves.

3. It is not relevant to take into account subsequent disabilities to earn not caused by the accident: whether such disabilities are permanent or temporary. This has been decided where the disability was caused by heart disease: *Harwood* v. *Wyken Colliery Co.* (1), imprisonment: *McNally* v. *Furness, Withy & Co.* (2), internment: *Cargo Fleet Iron Co.,* v. *Funck* (3) The principle of these cases seems to be that the compensation awarded by the Act is a statutory right; is not to be measured as would be damages at common law for a tortious injury; and is not to be based upon a calculation of whether, independently of the injury, the workman, from disease, age or other causes, would have continued to be of the wage-earning capacity he possessed just before the accident. I am not sure that all the reasons given in the cases last cited can be reconciled with the reasoning in *Woodilee Coal and Coke Co.* v. *M'Neill.* (4) But the decisions are well established. I think the last two rules may be reconciled—if they need reconciliation—by saying that the necessary implication from the provisions of the statute is that in assessing compensation it is to be assumed that, but for the accident, the workman would continue in the future to possess the same capacity to work as he had at the date of the accident.

It follows I think from the above summary that the learned judge in this case failed to apply the correct principle in coming to his decision. The applicant has two qualifications—she was cook and machinist. The judge measured her loss of earning capacity by considering what she would have earned

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(1) (1913) 6 B. W. C. C. 225.
(2) 6 B. W. C. C. 664.
(3) 9 B. W. C. C. 318.
(4) [1918] A. C. 50.

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but for the accident, not as machinist, but as cook, and he found that the injury did not affect her earning capacity as cook. His reason for disregarding her earning capacity as machinist is that at the hearing she had stated her intention not to resume such work. This consideration for the reasons I have given in stating r. 3 above seems to me to be irrelevant. It cannot put her in a worse position than a subsequent incapacity unconnected with the injury. If an injured workman declines to do any work the Court proceeds to consider what work he could do if willing; and proceeds to assess compensation on that footing. It has never hitherto been suggested that the Court could say: "You decline to do any work, therefore you would not have worked at your pre-accident employment, therefore you have suffered no loss." If the applicant is entitled to have considered her loss of earning capacity as machinist there is ample evidence that such loss in fact exists. Her earnings were at piece rates, and the injury, a stiff thumb joint causing defective grip, appears to be likely to cause diminution in rapid production. I think that the appeal should be allowed and the case remitted to the learned judge.

Appeal allowed.

Solicitors: *Castle & Co.; Clifford Turner & Hopton.*

G. A. S.

[IN THE COURT OF APPEAL.]

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June 26; July 9.

JOHNSTON *v.* HENRY LISTON & CO.

Employer and workman—Infant workman—Injury by accident—Compensation—Agreement for payment of lump sum in satisfaction—Sanction of Court—Recorded agreement—Payment into court—Right of workman, on attaining 21, *to payment out—Workmen's Compensation Act,* 1906 (6 *Edw.* 7, *c.* 58), *Sched. I., cl.* 5, 17—*Workmen's Compensation Rules, r.* 53.

Rule 53 of the Workmen's Compensation Rules provides that: "Where an agreement is made for the payment of a lump sum in lieu of a weekly payment to a person under any legal disability, or for the redemption by a lump sum of a weekly payment payable to a person under any legal disability, and a memorandum thereof has been recorded in accordance with the Act and these rules, such sum shall be paid into Court, and shall be invested, applied, or otherwise dealt with by the Court in such manner as the Court in its discretion thinks fit for the benefit of the person entitled thereto."

Where, in pursuance of a recorded agreement between an infant workman and his employer, a lump sum of money had been paid into Court under Rule 53, in satisfaction of all claims under the Act in respect of an injury sustained by the workman in the course of his employment:—

Held, that the workman on attaining 21 was absolutely entitled to the fund and to have it paid out to him. *Held*, also, that an appeal lay to the Court of Appeal from the refusal of the county court judge to make an order for payment out.

Appeal from the refusal by the judge of the Dewsbury County Court of an order for payment to the applicant of a sum of 300*l.* which had been paid into court by his employers in satisfaction of all claims under the Workmen's Compensation Act, 1906, pursuant to an agreement made between the parties while the applicant was an infant, which agreement had been sanctioned by the judge and duly recorded. On October 8, 1918, the applicant, Harold Johnston, an infant aged 20, was injured whilst working for Henry Liston & Co. His left hand was crushed in some machinery, and his arm had to be amputated. After some negotiations, during which weekly compensation was paid, the employers by an agreement dated January 26, 1919, agreed to pay and the applicant to accept the sum of 300*l.* in satisfaction of all claims under the Act in respect of the accident. The agreement was sanctioned by the judge and duly recorded, and the 300*l.* was paid into Court pursuant to r. 53 of the Workmen's Compensation Rules.

On April 24, 1919, the workman attained 21. On May 1, 1919, he applied ex parte to have the fund paid out to him. The county court judge declined to make the order, taking the view that he had a discretion in the matter, but he directed that a sufficient sum should be applied out of the fund to enable the applicant to procure an artificial limb. The applicant appealed.

Pending the appeal, there being a doubt as to the proper procedure to be followed, the Divisional Court was moved under s. 31 of the County Courts Act, on behalf of the applicant, for an order directing the county court judge to show cause why he should not make an order for payment out, and upon that motion the Court granted a rule. The appeal now came on for hearing.

Morle for the appellant. Sched. II. (4.) gives the right to come to this Court. Under the Act of 1897 it was held that there was no appeal except in an arbitration, but clause 4 of the schedule is a wider provision. The words are "Any order under this Act," not necessarily in an arbitration under the Act. There was however a doubt as to the method of procedure, whether it should be by appeal or by mandamus. A rule was therefore applied for and obtained and is now pending, but that does not preclude the present appeal.

On the appeal it is submitted (1.) that the county court judge had no jurisdiction to refuse the order for payment out, and (2.), assuming that he had jurisdiction to make it, there was no evidence on which he was entitled to refuse it. His duty in the matter was merely ministerial. When the applicant attained 21 the control of the Court ceased. It lasted so long only as he was under legal disability. The fund is now the absolute property of the workman, and he is entitled to have it paid out to him.

The rule if construed as the county court judge has construed it would be ultra vires.

[The Workmen's Compensation Act, 1906, Sched. I. (5.), Sched. II. (9.) (12.), and Workmen's Compensation Rules, rr. 44 (6.) and 60, were also referred to.]

Cur. adv. vult.

July 9. WARRINGTON, L.J. This is an appeal by the workman from the refusal by the county court judge of an order for payment to him of a sum of money in court paid in by the employers in satisfaction of all claims under the Act pursuant to an agreement made while the applicant was an infant, sanctioned by the judge and duly recorded.

The workman on October 8, 1918, met with an accident which resulted in the loss of an arm. He was then an infant. On January 26, 1919, the agreement above referred to was made by which the employers agreed to pay 300*l.* in satisfaction of all claims.

On March 7, 1919, the agreement received the sanction of the judge and was duly recorded. Pursuant to r. 53 of the Workmen's Compensation Rules, the 300*l.* was paid into Court.

The applicant attained the age of 21 years on April 24, 1919, and shortly afterwards applied ex parte for payment to himself of the fund. The learned judge being of opinion that, notwithstanding the applicant was of full age, he still retained a discretion as to the mode in which the fund should be applied, refused to go further than to provide for the payment for an artificial limb. The workman appeals and insists that being now of full age he is absolutely entitled to the fund, and there is nothing in the Act or the Rules which entitles the judge to refuse his request for payment.

It has been suggested that there is a possible question whether the refusal of the county court judge is subject to an appeal to this Court.

The provision as to appeals is contained in clause 4 of the Second Schedule to the Act and gives an appeal to this Court where the Arbitrator (in this case the county court judge) gives any decision or makes any order under the Act. The judge derives his jurisdiction to deal with the fund from the

Act and the Rules made thereunder. He has made an order dealing partially with the fund. This order was, in my opinion, made under the Act and an appeal therefore lies to this Court.

The question turns on the construction of r. 53 of the Workmen's Compensation Rules, which is in these terms: "Where an agreement is made for the payment of a lump sum in lieu of a weekly payment to a person under any legal disability or for the redemption by a lump sum of a weekly payment payable to a person under any legal disability, and a memorandum thereof has been recorded in accordance with the Act and these Rules, such sum shall be paid into court and shall be invested, applied, or otherwise dealt with by the Court in such manner as the Court in its discretion thinks fit for the benefit of the person entitled thereto, and the receipt of the Registrar of the Court shall be a sufficient discharge in respect of the amount paid in: and the provisions of para. 5 of the First Schedule to the Act and of r. 60 shall apply to the payment into court and the investment and application of such lump sum." The agreement in this case was one for payment of a lump sum in lieu of a weekly payment to a person under legal disability and the rule therefore applies.

Clause 5 of the First Schedule is in the following terms: "The payment in the case of death shall, unless otherwise ordered as hereinafter provided, be paid into the county court, and any sum so paid into court shall, subject to rules of court and the provisions of this Schedule, be invested, applied, or otherwise dealt with by the court in such manner as the court in its discretion thinks fit for the benefit of the persons entitled thereto under this Act, and the receipt of the registrar of the court shall be a sufficient discharge in respect of the amount paid in." Rule 60 really throws no light on the present question.

The fifth clause which I have read in my opinion also throws no light on the construction of r. 53. The position of the dependants of a deceased workman is different from that of a workman entitled to compensation for injury. In the case of dependants they become entitled only to what the Act gives them—namely, a right to the application for their benefit

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of the amount awarded. In the other case the workman has an absolute right to the compensation itself whether his title arises from an agreement or from an award. Does then r. 53 enable a judge to retain the fund in court when the person to whom it belongs is absolutely entitled to it and is under no legal disability?

The Act could, of course, impose any restriction the Legislature thought fit on the right of a person of full age and not otherwise under any disability to dispose as he pleases of his own property, and some people may think it desirable to maintain the condition of pupilage notwithstanding the termination of the legal period of infancy, but in my opinion the Court ought not to be astute to discover such a restriction of the rights of property, and ought not to hold it to be imposed except by express words or by necessary implication.

I can find nothing of the kind here. The words "for the benefit of the person entitled to" seem to me to mean for the benefit of a person already described—namely, a person under legal disability and I think that when that disability ceases the discretion ceases also. Nothing remains but the absolute title with the legal rights attached to it, one of which is to have the fund paid to the owner. Reference has been made to clause 17 of the First Schedule to the Act. This deals with sums paid by the employer (otherwise than by agreement with the workman) for redemption of weekly payments, and it is provided that such sum may be ordered by the arbitrator or judge of county courts to be invested or otherwise applied for the benefit of the person entitled thereto, but it is expressly provided that nothing in that paragraph shall be construed as preventing agreements being made for redemption of a weekly payment by a lump sum. A sum payable under such an agreement to a person under disability is dealt with by r. 53 referred to above. It would appear then that in the case of money paid in redemption of a weekly payment otherwise than by agreement the Act confers no absolute title on the workman but the Legislature has thought fit to limit his right to that of having the money applied for his benefit.

This is not so in the case of money paid under an agreement, whether it be in lieu of or in redemption of weekly payments. In these cases the suggested discretion rests entirely on r. 53 as to the construction of which I have expressed the opinion that it confers no such discretion. Further I think that if the Rule were to be construed as the judge has construed it, it might well be held to be ultra vires as being beyond the authority conferred on the Rule-making body.

I think the appeal should be allowed and an order made for payment to the applicant.

Duke and Atkin L.JJ. agreed.

Solicitors: *James, Mellor & Coleman, for Learoyd & Co., Huddersfield.*

G. A. S.

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July 24.

CORDINER, APPELLANT *v.* STOCKHAM, RESPONDENT.

Revenue—Entertainments Duty—Payments for Admission to Entertainment—Band Hall on Pier—Payment for Ticket on taking Seat in Building—Finance (New Duties) Act, 1916 (6 *Geo.* 5, *c.* 11), *s.* 1, *sub-ss.* 1, 2, 3, 6.

By s. 1, sub-s. 1, of the Finance (New Duties) Act, 1916, there is to be paid on all payments for admission to any entertainment as defined by the Act "an Excise duty (in this Act referred to as 'entertainments duty') . . . ."

By sub-s. 2, if any person is admitted for payment to any place of entertainment and the provisions of the section are not complied with, the person admitted and the proprietor of the entertainment are liable to an Excise penalty of 5*l.* and 50*l.* respectively and the proprietor is, in addition, liable to pay the duty which should have been paid.

By sub-s. 6 the expression "admission" means admission as a spectator or one of an audience.

An inspector of the Brighton police force who was also appointed to look after entertainments duty visited the Palace Pier Band Hall, a structure on the pier. He went into the building and took a seat, for which he paid 2*d.* and received a ticket. The bandstand is in the centre and the seats are in series fixed together and screwed to the floor and they are so arranged that all the persons occupying them face the band. The sides are glass folding panels which are all connected and fold up concertina-like. The central eastern side was open when he entered and shortly afterwards the folding glass panels of the side were drawn and curtains were drawn all around the building so that it would be in utter darkness from the outside. When the building is closed in this way it becomes a closed building and is for all practical purposes a closed building with a sitting audience. There was no convenience whatever for persons to stand within the band hall, and if they did so they would cause obstruction to the gangways. If the public stand in the gangways they are required to leave. A programme of music was gone through by the band. The structure has a zinc roof and the chairs under it are fixed tip-up chairs. There are hundreds of unfixed chairs on other parts of the pier, the majority being in the vicinity of the bandstand. The unfixed chairs are marked "This chair must not be moved to any other part of the pier." A person occupying a chair on any part of the pier can move to another part of the pier and sit in a chair where he can hear the band and no further payment is required. There are no free seats under the structure nor outside in the immediate vicinity of the bandstand. At all times the seats under the structure can be used by the public on payment of 2*d.*

Upon an information before justices against the appellant, the proprietor of the entertainment, charging that the inspector was admitted to the entertainment contrary to s. 1 of the Act of 1916, the appellant did not dispute that if, in the circumstances, there had been payment for admission to a place of entertainment where the payment was subject to entertainments duty, he had committed an offence. The justices convicted the appellant, finding that on the facts there had been admission to an entertainment within the meaning of the Act :—

Held, that there was evidence upon which the justices could so find, and that therefore the conviction must be affirmed.

CASE stated by justices for the county borough of Brighton.

At a court of summary jurisdiction an information was preferred by the respondent Stockham, one of His Majesty's officers of Customs and Excise who prosecuted for His Majesty by order of the Commissioners of Customs and Excise, for that on March 29, 1918, at the Palace Pier Band Hall, in the borough of Brighton, one Bingham was admitted for payment to a certain place of entertainment where the payment was subject to entertainments duty, otherwise than in compliance with the provisions of s. 1 of the Finance (New Duties) Act, 1916 (1),

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(1) Finance (New Duties) Act, 1916 (6 Geo. 5, c. 11), s. 1, sub-s. 1: "There shall, as from the fifteenth day of May, nineteen hundred and sixteen, be charged, levied and paid on all payments for admission to any entertainment as defined by this Act an Excise duty (in this Act referred to as 'entertainments duty') . . . .

Sub-s. 2: "No person shall be admitted for payment to any entertainment where the payment is subject to entertainments duty except—

"(*a*) with a ticket stamped with a stamp (not before used) denoting that the proper entertainments duty has been paid; . . . ."

"If any person is admitted for payment to any place of entertain-contrary to the section and that the appellant Cordiner was the proprietor of the entertainment whereby the appellant was liable in respect of the offence to an Excise penalty of 50*l.*

The case stated by the justices was (so far as material) as follows :—

1. Bingham was an inspector in the borough of Brighton police force and was also a person appointed to look after entertainments duty. He visited the Palace Pier Band Hall on March 29, 1919, at 6.45 P.M., and went into the building and took a seat near the eastern side. A girl went to him and he paid 2*d.* and received from her a ticket. There was an attendant going about inspecting the tickets. By 7 P.M. the building was filled.

2. The bandstand is in the centre and the seats are in series fixed together and screwed to the floor, and they are so arranged that all the persons occupying them face the band. The sides are glass folding panels which are all connected and fold up concertina-like.

3. The central eastern side was open when he entered and at 7.45 P.M. the folding glass panels of the side were drawn and curtains were drawn all around the building so

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ment and the provisions of this section are not complied with, the person admitted and the proprietor of the entertainment to which he is admitted shall be liable in respect of each offence to an Excise penalty, in the case of the person admitted of five pounds, and in the case of the proprietor of fifty pounds, and the proprietor shall in addition be liable to pay any duty which should have been paid."

Sub-s. 3: "Entertainments duty shall be charged in respect of each person admitted for payment . . . ."

Sub-s. 6: "For the purpose of the provisions of this Act relating to entertainments duty—

"The expression 'entertainment' includes any exhibition, performance, amusement, game or sport to which persons are admitted for payment; and the expression 'admission to an entertainment' includes admission to any place in which the entertainment is held;

"The expression 'admission' means admission as a spectator or one of an audience, and the expression 'payment on admission' includes any payment made by a person who, having been admitted to one part of the place of entertainment, is subsequently admitted to another part thereof for admission to which a payment involving duty or more duty is required; . . . ."

that it would be in utter darkness from the outside. When the building is closed in this way it becomes a closed building and is for all practical purposes a closed building with a sitting audience.

4. There was no convenience whatever for persons to stand within the band hall, and if they did so they would cause obstruction to the gangways. If the public stand in the gangways they are required to leave.

5. There was a notice printed on each side of the bandstand as follows : " Visitors are requested to make as little noise as possible in the band enclosure. On no account will children be allowed to run about or dance during the concert. By order, B. M. P. P. Co."

6. A programme of music for that night was gone through by the Grenadier Guards band. At the entrance to the pier there were posters announcing that the band would be playing during Easter, and stating the times as given on the programme.

7. The pier has been erected ten to fifteen years. It is about 570 yards long. At the sea end there is a theatre. In the middle is the band hall or structure. Near the shore end is a winter garden. This band hall or structure is entirely closed during the winter when no band plays, and during the winter the public are not admitted to the fixed seats, nor is the band hall or structure round the bandstand used as a shelter during that time although during that time the pier is open.

. . . .

13. Up to the year 1911 the bandstand was surrounded by canvas awnings upon gas-barrelled standards or supports. The bandstand now in use is the same, the only difference being that the area of the structure round the bandstand has been enlarged since and the seats have been fixed.

14. In 1911 the present structure was erected in the place of the movable awning, the roof being made of zinc. The folding windscreens are provided for protection from the weather.

15. Up to 1916 there was a complete rail all the way round

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excluding anyone who did not go through a turnstile at the north or south entrance. In 1916 the whole of the railing was removed and the turnstile taken away. Whilst the railing and turnstiles were in existence a charge was made to persons passing through the turnstiles and persons so entering could occupy chairs without further payment. Entertainments tax was paid in respect of that charge. Since their removal, except where the folding screens are drawn, there is nothing to separate the area around the bandstand from the main deck of the pier. Cast-iron columns are necessary supports to the roof, and apart from these columns there is nothing to prevent a person going along the gangways from end to end or, except when the screens are drawn, walking in at one side and out of the other.

16. The chairs under the structure are fixed tip-up chairs, and there are 812.

17. In addition to the fixed tip-up chairs under the structure, there are hundreds of unfixed chairs on other parts of the pier.

18. There are about 1,800 unfixed chairs, the majority in the vicinity of the bandstand which are arranged around the structure facing the band. The unfixed chairs are marked "This chair must not be moved to any other part of the pier."

19. A person pays a pier toll of 2*d*. to get on to the pier and there are plenty of free seats. (1)

20. If a person wants a chair he pays 2*d*. and there is no specific contribution to the band, but the sums so received go towards the expenses, including the expense of the band. In exchange for the 2*d*. he receives a coloured ticket according to the time of the day, which is divided up into three sessions, 10 to 1, 1 to 5 and 5 to 10, but on March 29, the evening session was from 5 to 9. There is no reference whatever to any entertainments on the ticket.

21. A person occupying a chair on any part of the pier can move to another part of the pier and sit in a chair where he can hear the band and no further payment is required. The

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(1) During the arguments it was stated, and not disputed, that Bingham did not pay the pier toll of 2*d*. The question whether entertainments duty is payable upon the pier toll of 2*d*. was not before the Court.

conditions of sitting are the same wherever a person sits, the only difference being that if a person sits under or near the structure he gets the advantage of hearing the band.

22. Except for the last-mentioned difference, the only difference between a person sitting on an unfixed seat and a person sitting on one of the tip-up seats is that the former has no shelter over his head and the latter has.

23. There are no free seats under the structure or outside in the immediate vicinity of the bandstand.

24. About 1500 people can stand in the area surrounding the bandstand outside the structure. There is plenty of room for people to promenade around the structure in the outside area, but there is no promenading within the structure or along the gangways in the structure.

25. At all times the seats under the structure can be used by the public on payment of 2*d.*, whether there be band performances or not. There are no free seats in the enclosure or outside it. People sit on the chairs under the structure when there is no band playing, although not frequently.

26. The bands are engaged to attract people to the pier, and the pier company chiefly depend on the pier toll for their revenue, and it would not be possible to carry on the undertaking with the money from the chairs.

27. The bands for Easter week cost 400*l.* and the money from the chairs would not possibly pay that.

28. On March 29 the number of people admitted to the pier and paying toll was 13,000, and out of this number 4500 occupied chairs.

On Whit Sunday 19,000 people paid toll, and 8000 occupied chairs.

29. It was not disputed by the appellant that the music played by the band constituted a performance. It was further admitted that the appellant was to be taken as the person liable if an offence had been committed, and that if the circumstances hereinbefore set out constituted payment for admission and admission to a place of entertainment where the payment was subject to entertainments duty an offence had been committed.

On behalf of the appellant it was contended:

1. That Bingham was not admitted for payment to a place of entertainment where the payment was subject to entertainments duty.

2. That there was no payment for admission demanded of or made by Bingham—that paying for a chair does not constitute a payment for admission.

3. That there was no admission of Bingham to the entertainment—the entertainment is on the pier, perfectly open.

On behalf of the respondent it was contended:

(1.) That the payment made by Bingham was on the facts a payment in respect of which entertainments duty was payable.

(2.) That on the facts Bingham had been admitted for payment to a place of entertainment.

(3.) That on the facts the offence charged had been committed.

The justices found that Bingham was admitted to a place of entertainment where the payment was subject to entertainments duty otherwise than in compliance with the provisions of s. 1 of the Finance (New Duties) Act, 1916 and convicted the appellant.

The question for the opinion of the Court was whether the justices came to a correct determination in point of law.

Upjohn K.C. and *Barrington-Ward K.C.* for the appellant. The question is whether the 2*d*. Bingham paid for the use of a chair was paid for "admission to any entertainment" within the meaning of s. 1 of the Finance (New Duties) Act, 1916. He paid for the use of a chair only—not for admission to an entertainment. Bingham bought what may be called a "rover ticket," entitling him to sit in any part of the pier, and the fact that he selected a chair in a place where he could hear the band does not make the payment of the 2*d*. he paid for the ticket a "payment for admission" to an entertainment. The motive of the payer cannot be the test. The question is what is the contract between him and the appellant. The Palace Band Pier Hall cannot be converted into a place of entertainment because a ticket is used, not as a rover ticket but the buyer sits in a chair near the band. During the greater part of the year there is no enclosure. The band is only there during certain seasons of the year and at certain times. As soon as Bingham entered the pier he had the right to stand close by the band and hear it. He then paid for the ticket, but only to obtain the right to use the chair.

Sir Gordon Hewart A.-G. and *Giveen* for the respondent. A person may pay for admission to a theatre and yet spend his time in the bar. There was ample evidence upon which the justices could find that the Palace Band Pier Hall was a place of entertainment.

Barrington-Ward K.C. in reply. The entertainments duty is levied not upon the place but upon the person. There is no evidence of admission, the meaning of which is going into a place from which the person entering was previously excluded. The idea of an enclosure is dominant. That is clearly indicated in s. 1, sub.-s. 2 (*b*), and s. 2, sub-s. 1 (*c*), of the Act where barriers and mechanical contrivances for registering the number of persons admitted are mentioned. The whole purpose of the ticket bought by Bingham was that he might be enabled to sit instead of standing.

THE EARL OF READING C.J. We have heard a very interesting argument, but the conclusion at which I have arrived is that the justices' finding cannot be disturbed. The question arises under the Finance (New Duties) Act, 1916, which imposes a tax on all payments for admission to any entertainment as defined by the Act, and the question before us is whether the payment of 2*d.* made by Inspector Bingham was a payment for admission to a place of entertainment. He was admitted to the pier without payment, and for the purposes of this case I pay no further attention to the admission to the pier. It is not necessary to express any view as to whether sums paid for admission to a pier where there is an entertainment proceeding are taxable or not. That is not a matter we have to decide.

Upon the pier there is a place which is roofed; the place is a structure with a roof upon it, under which there are 812 fixed seats, and there is also a band which plays. A person may pay 2*d*. and get a right at certain stated hours and within the period named on the ticket to sit in a chair on any part of the pier which would also include a seat to hear the band. A person who enters the structure and takes a seat for the purpose of hearing the band has to pay 2*d*. When he has paid 2*d*. he has a right to go and occupy a chair at any other part of the pier. Upon the facts presented to the justices they came to the conclusion that Inspector Bingham had paid 2*d*. for admission to the place of entertainment.

I am not desirous of giving a decision which would be on the very narrow ground that the inspector, in fact, paid for admission. I think the broader question is involved, namely, whether a person who pays to occupy a chair where the entertainment is proceeding makes a payment which is taxable within the meaning of the Act. That he pays there is no doubt; that the place where he is is a place of entertainment, there is equally no doubt. But it has been contended on behalf of the appellant that he does not pay for admission to the place of entertainment.

It is quite true that he may hear the band whilst walking about or standing outside the structure, and without making any further payment, thus obtaining the benefit of the entertainment; but it is nevertheless true that when he pays the 2*d*. and obtains a right to one of the fixed seats, he is paying it in order to have the benefit of the entertainment in that place and to enjoy it with the greater comfort. It cannot be said that a person who pays for admission to this place—that is, who enters and takes a chair where the band is playing and pays 2*d*.—is not paying for admission, although I can well understand that there is a difficulty in distinguishing between the case of the person who has paid to occupy a chair outside the stand and who nevertheless is entitled to admission within the stand. We are only concerned with the case of persons who pay their 2*d*. when taking a chair in the roofed structure where the band is playing. The justices have decided that payment made by that person is within the Act, and I think on the facts they were entitled to arrive at that conclusion. I do not desire to go further than is necessary for the purpose of this case but it is obvious that the language of the statute is capable of a very wide interpretation. It is sufficient to deal with the actual case which is before us, and in my judgment the justices' decision cannot be impugned and the appeal must consequently be dismissed.

DARLING J. I am of the same opinion having regard to the precise facts of this case. I think the justices had evidence before them upon which they might lawfully come to the conclusion at which they arrived, but I think that cases may easily arise where justices may legitimately come to a totally different conclusion regarding a person sitting on one of these seats. For instance suppose a man stone deaf to go on to the pier and take a chair and sit at the end of the pier for the benefit of his health—or perhaps to sketch so that his whole interest would be in looking at the sea and sketching it. Suppose it came on to rain and he got up and left the chair where he had been sitting and went in under the shelter where Bingham went, and sat down in the very seat where Bingham sat and the band was playing. Suppose it was said that a tax ought to be paid in respect of him and that if he had not obtained a ticket stamped in the proper way he would be liable to a penalty of 5*l*. If the justices came to the conclusion that no offence had been committed I should agree with them. Therefore I do not think that the present case determines quite as much as the parties may suppose. Upon the very facts of this case I agree that the justices were right, but further than that I do not go.

BRAY J. I am of the same opinion. The justices have found in terms that the payment made by Bingham was, on the facts proved or admitted, a payment in respect of which entertainments duty was payable, and inasmuch as no entertainment duty is payable unless it is a payment for admission to an entertainment, that involves the finding that the payment was in fact for admission. The important facts seem to be those stated in paras. 1, 3 and 4 of the case stated by the justices. Those facts in my opinion prove that the building was a place of entertainment and that in that place of entertainment persons must sit down. They are not allowed to walk about or to stand in any place where they would obstruct other people, and if persons stand in the gangways they are required to leave so that, in effect, in my opinion that 2*d.* was paid for admission to hear the entertainment and to obtain the privilege of sitting on the chair. In other words the payment included—and that is quite sufficient for this purpose—a payment for admission.

In my judgment the justices were right, and in any event I am of opinion that there was sufficient evidence on which to find that the appellant was in fact liable.

Appeal dismissed.

Solicitors for appellant: *Woodham Smith and Borradaile for G. S. Godfree, Brighton.*

Solicitor for respondent: *Solicitor for Customs and Excise.*

J. E. A.

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June 17, 18;
July 24.

COMMISSIONERS OF INLAND REVENUE *v.* BLOTT.
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Revenue—Income Tax—Super-tax—Assessment—Shareholder in Company—Income—Bonus—Allotment of Fully Paid-up Shares—Income Tax Act, 1842 (5 *&* 6 *Vict., c.* 35), *ss.* 40, 54, 163, 164, 165—*Finance* (1909-10) *Act,* 1910 (10 *Edw.* 7, *c.* 8), *s.* 66.

The Finance (1909–10) Act, 1910, which imposes the super-tax provides by s. 66, sub-s. 2, that "For the purposes of the super-tax, the total income of any individual from all sources shall be taken to be the total income of that individual from all sources for the previous year, estimated in the same manner as the total income from all sources is estimated for the purposes of exemptions or abatements under the Income Tax Acts."

An assessment to super-tax under that Act was made upon the respondent for a certain year in respect of an allotment of shares in a limited company. In the previous year the company, having by its articles power to do so, had passed a resolution declaring that out of part of its undivided profits a bonus should be paid to its shareholders and authorising in satisfaction of that bonus a distribution among the shareholders of certain of its unissued shares credited as fully paid up, and the respondent's said shares had been allotted to him in that previous year pursuant to that resolution.

Held, that for the purposes of the super-tax the shares so allotted to the respondent could not be treated as part of his total income from all sources, inasmuch as they were not within the meaning of the above sub-section part of the respondent's "total income . . . . from all sources for the previous year" estimated in the manner there mentioned, but were an addition to his capital in that year.

Swan Brewery Co. v. *The King* [1914] A. C. 231 held inapplicable.

Two cases stated by the Commissioners for the Special Purposes of the Income Tax Acts.

COMMISSIONERS OF INLAND REVENUE *v.* BLOTT.

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts, John Blott, hereinafter called "the respondent," appealed against additional assessments to super-tax in the sum of 500*l*. for the year ending April 5, 1916, and 750*l* for the year ending April 5, 1917, under the Finance (1909–10) Act, 1910 (1), and subsequent enactments.

(1) Finance (1909-10) Act, 1910. Sect. 66: "(1.) In addition to the income tax charged . . . . there shall be charged, levied, and paid for the year beginning on the sixth day of April nineteen hundred and nine, in respect of the income of any individual, the total of which from all sources exceeds five thousand pounds, an additional duty of income tax (in this Act referred to as a super-tax) at the rate of sixpence for every pound of the amount by which the total income exceeds three thousand pounds.

"(2.) For the purposes of the super-tax, the total income of any individual from all sources shall be taken to be the total income of that individual from all sources for the previous year, estimated in the same manner as the total income from all sources is estimated for the purposes of exemptions or abatements under the Income Tax Acts; but, in estimating the income of the previous year for the purpose of super-tax,

. . . .

"(*d*) Any income which is chargeable with income tax by way of deduction shall be deemed to be income of the year in which it is receivable, and any deductions allowable on account of any annual sums paid out of the property or profits of the individual shall be allowed as deductions in respect of the year in which they are payable, notwithstanding that the income or the annual sums, as the case may be, accrued in whole or in part before that year."

2. The respondent is a shareholder in Hepburn, Gale and Ross, Ld., hereinafter called "the company." By the company's articles of association it is provided, art. 50. "The company may from time to time . . . . by special resolution, increase its capital by the creation and issue of new shares . . . ."

Art. 127, "Any general meeting declaring a dividend may direct payment of such dividend wholly or in part by the distribution of specific assets, and in particular of paid-up shares of the company or paid-up shares of any other company, and the directors shall give effect to such resolution . . . ."

Art. 128. "The directors may, before recommending any dividend, set aside out of the profits of the company such sum as they think proper as a reserve fund, which shall at the discretion of the directors be applicable for meeting contingencies, for the gradual liquidation of any debt or liability of the company, or for repairing or maintaining the works connected with the business of the company, or shall be as to the whole or in part applicable for equalising dividends or for distribution by way of bonus among the members of the company for the time being, on such terms and in such manner as the company in general meeting shall from time to time determine."

3. The company's accounts are made up to December 31 every year. For the year to December 31, 1914, the company made a profit of 58,851*l*. 10*s*. 10*d*., which together with the sum of 3051*l* 10*s*. 5*d*. carried forward from the previous year, made a total available for distribution of 61,903*l*. 1*s*. 3*d*. Dividends on the preference and ordinary shares in the company amounting to 13,288*l*. 8*s*. were paid in cash out of this amount, 10,000*l*. was placed to the credit of the general reserve fund, and by a resolution of the shareholders of February 8, 1915, passed upon the recommendation of the directors, a bonus was also declared at the rate of 33⅓ per cent. free of income tax on the ordinary shares, which the directors were authorized to satisfy by the distribution of 33,316 unissued second preference shares of 1*l*. each (face value) credited as fully paid. Under that resolution no provision was made for the payment

of the bonus in cash in any case except so far as such distribution would otherwise involve (which it did not in the respondent's case) the issue of fractional certificates for an amount less than 1*l*. An agreement dated February 8, 1915, between the company and Mr. S. J. Bradford on behalf of the shareholders was entered into for the purpose of carrying out the distribution. Similarly for the year to December 31, 1915, the company made a profit of 249,091*l*. 14*s*. 6*d*., which together with the sum of 4881*l*. 6*s*. 7*d*. carried forward from the previous year made a total available for distribution of 253,973*l*. 1*s*. 1*d*. Out of this sum, 75,000*l*. was carried to general reserve, 25,500*l*. was paid in cash as dividends on ordinary and preference shares, and by a resolution of shareholders of February 7, 1916, upon the recommendation of the directors a bonus was declared at the rate of 33⅓ per cent. free of income tax on the ordinary shares, which the directors were authorized to satisfy by the distribution of 50,000 unissued second preference shares of 1*l*. each (face value) credited as fully paid. The distribution of these bonus shares was carried out under an agreement dated February 10, 1916, between the company and Mr. C. Walker on behalf of the shareholders.

4. In the year ending April 5, 1915, the respondent received as his share of the said distribution shares of the face value of 500*l*., and in the year ending April 5, 1916, shares of the face value of 750*l*., the assessments in respect of which to super-tax form the subject of this appeal. At the hearing of the appeal no question was raised as to the amount of the assessments, nor as to the value of the shares distributed, beyond a contention on behalf of the respondent that the issue of additional shares to him in proportion to his existing holding automatically reduced the value of each individual share held.

For the respondent it was contended that by reference to the decision in *Bouch* v. *Sproule* (1) the distribution of shares must be treated as a distribution of capital and not of income.

For the Commissioners of Inland Revenue it was contended that the rule in *Bouch* v. *Sproule* (1) had no application.

The Special Commissioners who heard the appeal in defer-

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(1) (1887) 12 App. Cas. 385.

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ence to the opinion of other Special Commissioners upon this point in similar cases held that the rule in *Bouch* v. *Sproule* (1) did apply, and discharged the assessments appealed against.

The Commissioners of Inland Revenue appealed.

Sir Gordon Hewart A.-G., *Frank Russell K.C.* and *T. H. Parr* for the appellants. These bonus shares were distributed as income not as capital. The question has arisen in the Chancery Court as between life tenant and remainderman in *Bouch* v. *Sproule.* (1) There a testator bequeathed his residuary personal estate in trust for his wife for life, and after her death to B. Part of the estate consisted of shares of a company whose directors had power before recommending a dividend to set apart out of the profits such sum as they thought proper as a reserve fund for meeting contingencies, equalising dividends, or repairing or maintaining the works. After the testator's death the directors distributed certain accumulated profits (which had been temporarily capitalised) as a bonus dividend, they allotted new shares (partly paid up) to each shareholder, including B., and applied the bonus dividend in part payment of the new shares. It was held by the House of Lords on the facts of the case that the company did not intend to pay any sum as dividend, but intended to appropriate the undivided profits as an increase of the capital stock; that the bonus shares were capital of the testator's estate and did not go to the tenant for life. There the question whether the bonus passed to the tenant for life under the testator's will depended on the intention of the company, for the testator, being a shareholder, must have intended to leave it to them to determine. Lord Herschell (2) in that case approved of the principle laid down by Fry L.J.: "When a testator or settlor directs or permits the subject of his disposition to remain as shares or stocks in a company which has the power either of distributing its profits as dividend or of converting them into capital, and the company validly exercises this power, such exercise of its power is binding on all persons interested under the testator or settlor in the shares, and consequently what is paid by the company as dividend goes to the tenant for life, and what is paid by the company to the shareholder as capital, or appropriated as an increase of the capital stock in the concern, enures to the benefit of all who are interested in the capital." But though the intention of the company is the determining fact where the question arises between the claimants under a will or settlement, it is otherwise where it arises between the subject and the Crown. Here by the resolutions of the shareholders the bonuses were to be distributed in the form of fully paid shares. But in order to comply with s. 88 of the Companies Consolidation Act, 1908, the company must show that those shares have been paid by the allottees, and that they could not show except on the assumption that there was notional payment of the dividend to the shareholders in cash, and an immediate return of the cash by the shareholders to the company, in which case the liability to income tax, or super-tax as the case may be, would attach as soon as the cash dividend was paid, and the fact that afterwards that cash was used to purchase shares of the company would be perfectly immaterial. The shareholder would be in exactly the same position as if he spent the cash in any other way.

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(1) (1887) 12 App. Cas. 385.

(2) 12 App. Cas. 397.

Sir John Simon K.C. and *Latter* for the respondent. This case is covered by *Bouch* v. *Sproule*. (1) There the distribution of the bonus shares was made under an article in precisely the same terms as those of the article on which the company acted in the present case. If the intention of the company is the governing factor as between life tenant and remainderman it must equally be so as between subject and the Crown. Indeed *Bouch* v. *Sproule* (1) is an *a fortiori* case, for there there was no obligation on the shareholder to invest the bonus dividend in the new shares, whereas here the respondent could not do otherwise. He had no choice in the matter.

F. Russell K.C. in reply. This case is on all fours with *Swan Brewery Co.* v. *The King*. (2) There a company in Western Australia had accumulated a large reserve fund out of its profits. In pursuance of resolutions it increased its share

(1) 12 App. Cas. 385.

(2) [1914] A. C. 231.

capital by 101,450*l.*, and new shares to that amount were allotted to the shareholders as fully paid pro rata according to their holding of old shares, the sum of 101,450*l.* being transferred from the reserve to the share capital account. No money passed. The company was charged under an Australian Act with duty as upon a "dividend." The Privy Council held that it was unable to pay the tax. Lord Sumner in delivering judgment said (1): "True, that in a sense it was all one transaction, but that is an ambiguous expression. In business, as in contemplation of law, there were two transactions, the creation and issue of new shares on the company's part, and on the allottees' part the satisfaction of the liability to pay for them by acquiescing in such a transfer from reserve to share capital as put an end to any participation in the sum of 101,450*l.* in right of the old shares, and created instead a right of general participation in the company's profits and assets in right of the new shares, without any further liability to make a cash contribution in respect of them."

COMMISSIONERS OF INLAND REVENUE *v.* GREENWOOD.

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts, Benjamin Isaac Greenwood, hereinafter called "the respondent," appealed against additional assessments to super-tax in the respective sums of 1,089*l.*, 1,172*l.*, 1,344*l.*, and 1,388*l.*, for the years ending April 5, 1915, 1916, 1917, and 1918.

2. The only question which was raised at the appeal and on which the opinion of the High Court is desired is whether the nominal value of certain ordinary shares in the Vulcan Foundry, Ld., hereinafter called "the company" allotted as fully paid up to the respondent in the circumstances herein stated in the years immediately preceding the respective years of assessment ought to be included in the computation of his total income from all sources under the Finance (1909–10) Act, 1910, s. 66.

4. By the company's articles of association it is provided, inter alia:

(1) [1914] A. C. 231, 235.

Art. 168. "The Board may, before recommending any dividend, set aside out of the funds of the company such sum as it, in its absolute discretion, shall think proper as a reserve fund or reserve funds for the redemption of the capital of the company, for meeting contingencies, or for equalising dividends, or for purchasing and leasing further lands, houses, or property, or to comply with the requirements of any concessions in which the company may have any interest, or for providing against losses or depreciation, or for new works, or for renewal of stock, plant, or machinery, or to provide against bad or doubtful debts, or to be used as a sinking fund to pay off the debentures, mortgages, bonds, obligations or incumbrances of the company, or to meet the depreciation in value of wasting property, or for any other purposes of the company. All moneys so set aside and all other moneys of the company not immediately applicable for any payment to be made by the company, may, subject to the provisions of these presents with respect to the purchase by the company of its own shares, be invested by the Board in such manner as the Board from time to time thinks proper. The Board may from time to time carry such reserve fund or any part thereof to capital account and may issue fully paid up shares in respect thereof to the members, or to any class of members, according to their priorities in proportion to their holding, or may divide and appropriate such reserve fund or any part thereof in specie amongst the members, or any class of members, according to their priorities in proportion to their holdings."

Art. 170. "The funds of the company available for dividend in any year shall be the sum declared by the Board in its absolute discretion to be such, after setting aside such sum (if any) to reserve fund as it may in its absolute discretion think fit, and out of such funds the company in general meeting may declare a dividend or bonus on the share capital of the company or otherwise deal with the same as may be determined. . . . ."

Art. 171. "Any general meeting declaring a dividend or bonus may direct payment of such dividend or bonus wholly or in part by the distribution of specific assets and in particular

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of paid-up shares, debentures or debenture stock of the company, or in any one or more of such ways, and the directors shall give effect to such resolution, and where any difficulty arises in regard to the distribution, they may settle the same as they think expedient, and in particular may issue fractional certificates and may fix the value for distribution of such specific assets or any part thereof, and may determine that such cash payments shall be made to any members upon the footing of the value so fixed, in order to adjust the rights of all parties. . . . ."

5. The company has year by year been charged to and paid income tax upon its profits, and has transferred the whole of those profits (excluding a reserve commenced to be formed in the year ending June 30, 1913, now amounting to 50,000*l.* for maintenance and renewals) to a revenue reserve account out of which all dividends have been paid. The company had not distributed the whole of its profits by way of annual dividend, but it has on several occasions made bonus distributions to its ordinary shareholders of fully paid ordinary shares. The first of these distributions was made in 1909, and in March in each of the five years from 1913 to 1917 inclusive the company distributed new shares to its shareholders at the rate of one fully paid ordinary share for each ten ordinary shares held.

6. The method of distribution adopted, e.g., in the year 1913, was as follows: At a directors' meeting held on March 13, 1913, it was resolved that subject to the sanction of a general meeting a bonus distribution of ten per cent. in ordinary shares to the ordinary shareholders out of the revenue reserve account be made. At an extraordinary general meeting of the company held on March 26, 1913, it was resolved that 25,286*l.* being part of the undivided profits of the company standing to the credit of its revenue reserve account be distributed as a bonus amongst the holders of the ordinary shares in proportion to the ordinary shares held by them respectively, and that the directors be authorized to allot and issue 25,286 of the unissued ordinary shares credited as fully paid, to the holders of the outstanding ordinary shares in satisfaction of the said bonus, such new shares to be held upon the same

terms and conditions respectively as the outstanding ordinary shares in respect of which they were allotted were held, and to be allotted as nearly as might be in proportion to the number of ordinary shares held by them respectively, with full power to make such provision by the issue of fractional certificates or otherwise as they thought expedient for the case of fractions. At a directors' meeting held on the same date a resolution was passed for the allotment of the said 25,286 shares accordingly. On April 15, 1913, a notice was sent to each of the shareholders, setting forth the terms of the resolution of the extraordinary general meeting, and stating that the board had allotted to him or her so many ordinary shares credited as fully paid, the certificate of which was enclosed.

The same course was followed in making the distributions in each of the years 1914, 1915, 1916 and 1917.

7. The balance of undivided profits standing to the credit of the company's revenue reserve account at June 30, 1912, amounted to 117,864*l.* 10*s.* 3*d.*, of which 27,757*l.* was distributed in dividends for the year ended on that date. A profit of 63,101*l.* 8*s.* 10*d.* was transferred to the revenue reserve account from the revenue account for the twelve months ended June 30, 1913, and interest amounting to 4505*l.* was credited to the revenue reserve account for the same period of twelve months. The profits shown by the revenue account for this period, and for each of the years ended respectively June 30, 1914, 1915, and 1917, was sufficient to pay the cash dividends for the year, and to cover the amount of the bonus distributed in fully paid shares within the year, but for the year ended June 30, 1916, the profit shown by the revenue account for this period was not by itself sufficient, but with the interest credited to the revenue reserve account was only insufficient for both purposes by the sum of 1331*l.* 12*s.* On no occasion was the company in possession of a cash balance at the time of the authorization or of the making of the bonus distribution of fully paid shares sufficient to pay the bonus in cash, but it was admitted that for realizing investments sufficient cash for this purpose might have been obtained. On some occasions the cash balance at June 30, when the

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company's annual balance sheet was prepared, exceeded the amount which would have been required to pay in cash the bonus authorized in the preceding March.

. . . .

9. The respondent was a holder of ordinary shares in the company, and in accordance with the above-mentioned resolutions there were allotted to him in March 1914, 1915, 1916 and 1917, the following numbers of 1*l.* ordinary shares credited as fully paid respectively—namely, 1089, 1172, 1344 and 1388.

It was contended on behalf of the respondent that he had received capital and not income, that the question was as to the intention of the company in making the distributions, and that the facts showed that the company had transferred reserve funds to capital account and intended to distribute and had distributed capital and not income, that the shareholders had at no time any right to money payment even if cash had been available or to anything except a proportional share of the increased capital of the company, and that the interests of the shareholders in the assets of the company had not been increased by the distribution made; and it was further contended that there was no distinction between cases where the shareholder was absolutely entitled and cases where he had only a life interest in the shares allotted, and that on the principle laid down in *Bouch* v. *Sproule* (1) the shares in the company distributed by way of bonus must be regarded as capital, and not income, and that consequently they should not be taken into account in computing the respondent's income for purposes of super-tax.

On behalf of the Crown it was contended: (*a*) That the company had not capitalised a reserve fund and made a distribution of capital among its shareholders, but had declared a dividend payable in shares, and the shares distributed would not as between tenant for life and remainderman be capital under the principle laid down in *Bouch* v. *Sproule* (1); (*b*) that the decision in that and other similar cases did not affect the question of liability to super-tax in a case where

(1) 12 App. Cas. 385.

accumulated profits of a company were distributed in the form of shares to a person who thereupon becomes entitled to them absolutely; (*c*) that the shares distributed to the respondent represented income chargeable with income tax by way of deduction and receivable by him in the year in which the distribution was authorized, and should be included in the computation of his total income from all sources for the purposes of super-tax for the following year.

The Commissioners were of opinion that on the principle laid down in *Bouch* v. *Sproule* (1) the shares distributed by the company would as between life-tenant and remainderman fall to be treated as capital, that although it did not necessarily follow that the same considerations would apply in the determination of the question of a claim by the Crown to super-tax when, as in the present case, the recipient of the shares was entitled to them absolutely, yet the result of a number of previous appeals had been that liability to super-tax was determined by applying the principle laid down in *Bouch* v. *Sproule* (1) to cases other than those of life interests, and having regard to the grave inconvenience that would arise from a diversity of practice they discharged the additional assessments.

Sir Gordon Hewart A.-G. (*Frank Russell K.C.* and *T. H. Parr* with him) for the appellants. This case raises the same general question as the last case, and the appellants again rely upon the argument which was advanced on their behalf in that case.

At the same time this case differs from the other in certain points which seem to make it somewhat more favourable for the appellants. Here the bonus was not distributed from the profits of the year in which it was declared, but from a revenue reserve fund derived from the profits of that and former years for the purpose of meeting various contingencies. Further, the resolution of the company declaring the bonus did not state that it was "free of income tax." Moreover, there was in this case no express agreement between the company and any representative of the shareholders purporting to bind them to accept the bonus shares.

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(1) 12 App. Cas. 385.

In the assessment of the super-tax pursuant to the Finance (1909–10) Act, 1910, some practical difficulty no doubt arises from the fact that by s. 66, sub-s. 2, the income of an individual is to be taken to be his income for the previous year, but in each case the liability is clear and the amount of the tax is capable of ascertainment.

In a case such as this, in which a shareholder in a company is assessed to the super-tax upon bonus shares, the face value of the shares does not represent the full amount upon which he should be assessed. By s. 66, sub-s. 2, for the purposes of the tax the total income of an individual is to be taken to be his total income for the previous year estimated as it is estimated for the purposes of exemptions or abatements under the Income Tax Acts. Here the income of the individual for the previous year is alleged to have consisted of bonus shares in a company. Under the Income Tax Act, 1842, s. 54, a statement is to be delivered of the profits of a company to be charged with income tax and the estimate is to be made on the amount of the annual profits of the company before any dividend has been made to any other persons, and all such other persons are to allow out of the dividend a proportionate deduction in respect of the duty charged. The company thus pays the income tax of the individual shareholder in advance. Under s. 164 of that Act a person claiming exemption shall deliver a declaration setting forth all the sources of his income and every annual payment reserved or charged thereon whereby the income shall or may be diminished. Hence, if the person claiming exemption from income tax is, like the respondent, a shareholder in a company, he must in his declaration of income set forth such a sum as represents the share of the company's profits which he would have received if the company had not already paid income tax upon its profits, that sum being obviously greater than the amount of his actual dividends or bonus by the proportionate amount of the tax. It follows that in assessing to the super-tax an individual who during the previous year was, like the respondent, a shareholder in a company, there must be added to the dividend or bonus which he received in that year the amount of the income tax which has been paid in respect thereof by the company. The point, however, does not apparently arise here, because the appellants have assessed the respondent only on the face value of the shares.

Sir John Simon K.C. and *Clauson K.C.* (*Bremner* with them) for the respondent: The present case and *Blott's Case* are not to be distinguished in principle.

There are, however, several distinctions between the two cases, which render the claim of the Crown even less maintainable in this case than in the other. In this case the company had followed the practice of issuing bonus shares before the passing of the Act of 1910 by which the super-tax was first imposed, and there is therefore no ground for suspecting that the company in allotting the bonus shares in question were making use of any ingenious device for the purpose of enabling the shareholders to evade the payment of super-tax. In both these cases the company has by its articles of association power to capitalise profits, but in the present case it has also by art. 168 a specific power to capitalise the revenue fund against which the bonus shares were allotted. The mere fact that in this case the resolution of the company for distribution of the bonus does not contain the words "free of income tax" raises no implication that the bonus was distributed not as capital but as income, because in every case, whether these words are used or not, the distribution must necessarily be made out of profits from which income tax has already been deducted. Neither does any such implication arise from the fact that in this case the bonus, in satisfaction of which these fully paid shares were allotted, was distributed not directly out of profits but out of the revenue reserve fund to which the profits had been carried, because in each of the years in question, with one small exception, the profits were sufficient, not only to pay the cash dividend for the year in full but also to cover the amount of the bonus, without any contribution from the revenue reserve fund.

The principle of *Bouch* v. *Sproule* (1) is applicable to the

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(1) 12 App. Cas. 385.

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present case and in accordance with that principle the bonus shares in question must be regarded as capital in respect of which the respondent is not liable to super-tax. The company by its articles of association has power without the consent of the individual shareholder to capitalise its profits or the reserve fund to which the profits have been carried. In exercise of that power the company in each of the years in question passed a resolution that a portion of the profits should be distributed as a bonus and that fully paid up shares should be allotted and issued in satisfaction of the bonus, and such shares were allotted accordingly. The result was that the bonus and the shares allotted in satisfaction of it were immediately converted into capital. The profits of the company's undertaking as they accrued due in each year were no doubt income of the company, but the portion of these profits which was distributed as bonus never became income of the individual shareholders, because, before it came to their hands, it had already been capitalised by virtue of the resolution of the company. Consequently, as super-tax is an additional income tax which is chargeable only upon the separate income of an individual, no super-tax is payable by the respondent in respect of the bonus shares which he received in any of these years.

[ROWLATT J. referred to *Tennant* v. *Smith*.(1)]

Frank Russell K.C. in reply: The case of *Bouch* v. *Sproule* (2) only decided that the profits of a company may be capitalised by means of appropriate machinery, and that in that particular case the machinery existed and had been used. In the present case the true effect of the resolution of the company was to direct the distribution of a cash bonus, which could be satisfied by an allotment and issue of fully paid shares, and therefore to increase the income of the shareholders.

Under s. 66 of the Act of 1910 the "income" of the individual which is chargeable with super-tax includes all money credited to him even although, before he actually receives it, it be changed into some other form such as shares.

If these bonus shares are income, the respondent is liable to super-tax in respect of those which were allotted to him.

(1) [1892] A. C. 150.

(2) 12 App. Cas. 385.

In getting them he obtained a benefit. It is possible that these new shares may cause some depreciation in the value of the original shares, but the fact remains that they represent fresh profits earned by the company and distributed among its members. See *Californian Copper Syndicate* v. *Harris.* (1)

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July 24. ROWLATT J. read the following judgment: The first of these appeals was brought by the Commissioners of Inland Revenue from a decision of the Special Commissioners holding, shortly stated, that the respondent was not assessable to super-tax in respect of a certain bonus allotment of shares. The shares in question, which before their distribution to the respondent and his fellow-shareholders had been authorized but unissued shares, were allotted fully paid up in satisfaction of a bonus declared out of the profits of the current year. The company by their articles had power to do this. The machinery adopted was that the bonus was declared and the shareholders, by an agreement executed on their behalf by a representative appointed for that purpose by the directors under powers conferred by the articles, accepted the shares fully paid up in satisfaction of the bonus. The shareholders had no option to receive the bonus in cash. This procedure was followed with no appreciable difference in form, and certainly with none of substance, in two successive years, to both of which the appeal relates.

Under these circumstances it was held by the Special Commissioners, and it seems to me manifest (nor did the Attorney-General dispute it at the Bar) that the company, having the power to do so, made the assets resulting from the profits of the year, against the retention of which this bonus was declared, capital of the company, and that in any question between tenant for life and remaindermen the bonus and the shares representing it would be capital in accordance with the principles laid down in *Bouch* v. *Sproule* (2), and the other authorities. But it was said that, the original shares being the absolute property beneficially of an individual, the bonus forms an item on which he is answerable to super-tax. It is to be observed that the figure on which he had been assessed was the face value of the shares, and it is stated in the case that at the hearing of the appeal no question was raised as to the amount of the assessment nor as to the value of the shares distributed, beyond a contention on behalf of the respondent that the issue of the additional shares to him in proportion to his existing holding automatically reduced the value of each individual share held. Similarly in the arguments before me the case put for the Revenue was that the bonus declared, which was of the same amount as the face value of the shares, became upon declaration income of the respondent liable to super-tax, and that the satisfaction of such bonus by the allotment of shares did not alter that position. It was, however, correctly pointed out by the Attorney-General that the amount of the bonus cannot be the correct sum upon which the respondent should be assessed, because income tax paid by the company on the profits before division has to be added. The true amount to be brought into the respondent's super-tax assessment (if anything) would therefore be such a sum as after deduction of income tax would yield, as a net sum, the amount of the bonus.

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(1) (1904) 5 Tax Cas. 159; 6 F. 894.

(2) 12 App. Cas. 385.

Subject to this correction, the question is whether the bonus declared was income assessable to super-tax. By s. 66, sub-s. 2, of the Finance (1909–10) Act, 1910, the income of an individual for super-tax purposes is his total income from all sources as it would be estimated for the purpose of exemption or abatement under the Income Tax Acts. That sends us to the Act of 1842. By virtue of ss. 40 and 54 of that Act every corporation, fraternity, fellowship company or society, corporate or not corporate, was answerable to income tax on the collective profits or gains. Under s. 100, Sched. D, First and Second Cases, r. 3, trading partnerships were also so assessable. Co-partners, joint tenants and tenants in common of land, and partners in the occupation of land were also necessarily so assessable under Scheds. A and B. The dividends or drawings of corporators, shareholders, partners, joint tenants and the like were not again taxable as a new subject-matter. Corporators or shareholders bore their share of the tax by the deduction of such share (i.e., a share of the collective tax, not an individual tax) from their dividends under the express authority of s. 54. Partners and the like also necessarily bore their share by the diminution, through the tax, of the divisible fund. It does not matter (except in the case of fixed or preferential dividends) whether the deduction of tax is expressly made or whether the distribution is said to be tax free. In either case no more can be divided out of profits than the tax collector has left to divide, and where a dividend is declared tax free the truth is that the dividend is such larger sum as after deduction of tax will leave the net sum which is described as the tax free dividend. At least this is the way in which the matter has always been looked at for the purpose of computing individual incomes, whether for the purpose of exemption or of super-tax.

For the main purpose of the assessment and collection of income tax therefore the Act regarded solely the collective profits and gains.

When, however, it came to deal with exemptions in respect of individual incomes it was necessary to segregate those incomes, and it is important to see how this was provided for in the several cases. In the case of trading (including professional) partnerships it was enacted by a proviso to the rule already quoted that a partner claiming exemption might declare the proportion of his share and be separately assessed accordingly. His income for the purposes of exemption was therefore his proportion of the collective taxable profits of the partnership. His actual or permissible drawings were wholly irrelevant. This proviso (in order, as was explained to me upon the argument, to avoid the formality of a separate assessment) is now replaced by s. 20 of the Finance Act, 1907 (7 Edw. 7, c. 13), which provides that for the purpose of exemption and the like the income of an individual partner from the partnership may be treated separately. The change from the precise language of the Act of 1842 to the loose word "income" perhaps not unnaturally gave rise to litigation, but it has been held by my brother Horridge in *Gaunt* v.

Inland Revenue Commissioners (1), that the share of the partner in the collective profits, and not as was contended his drawings, is still the figure to be looked for. So much for the case of partners. In the case of joint tenants and the like the principle was the same, it being provided by s. 168 that they might claim exemption according to their respective shares and interests.

Turning now to the case of corporate bodies, and societies, whether corporate or not, we find a marked difference. No individual corporator or shareholder, either by the formality of a separate assessment or without such formality can treat himself as having been individually taxed upon a proportion of the total collective gains corresponding to his own interest in the corporate concern, and he cannot therefore, without more, get allowed to him by exemption or return the tax paid by the corporation in respect of such proportion. There is no special direction for the calculation of the individual income of a corporator or shareholder. It is clear, however, that it is to be measured by his dividends. The only way that he can make the provision for exemption apply to his case is by bringing in his dividends among his "particular sources of income" under s. 164, and then, treating them as diminished by the collective tax in the way already described, obtain a refund under s. 165 as a person who "has been charged to and has paid" duty "by way of deduction from any rent, annuity, interest, or other annual payment." Of course before he can do this he must add to his actual dividend the proportion of the collective tax relating thereto, and bring the total into the account of his aggregate income in order to show that such aggregate is low enough to entitle him to the exemption. I have said advisedly the collective tax, because if the profits made by the company and taxed in their hands are not divided in that year but are carried forward and divided in a subsequent year when the rate of tax is different I know of no provision (and I do not overlook s. 66, sub-s. 2 (*d*) of the Finance (1909–10) Act, 1910), which either obliges or entitles the shareholder to treat his dividend as having suffered a deduction (whether described as having done so or not) at the rate obtaining in the year of distribution. If he could, he might if the income tax had risen, recover back more than the Revenue had received. This situation may in some cases, if an accurate calculation is to be achieved, occasion great difficulties. I need not however go into them in this particular case.

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(1) [1913] 3 K. B. 395.

For the present purpose all that is necessary—and that has been the object of what I fear has been a somewhat trite recital—is to bring out clearly that in order to estimate for the purpose of exemption the income of an individual from company shares, all that the Act of 1842 gives one to go upon is the "annual payment" derived by the shareholder from his holding. I lay no stress of course upon the word "annual." A dividend for the year is annual for this purpose though only paid once. What I do lay stress on is that one has to look for a "payment." Now I do not think that there is a payment of a dividend to a shareholder unless a part of the profits of the company is thereby liberated to him in the sense that the company parts with it, and he takes it. If, in this case, the company could have found means to capitalise their profits and divide them as capital without adopting the machinery of declaring a bonus and allotting shares by agreement (not, be it observed, a voluntary agreement) in satisfaction of such bonus, I do not think the case would have been arguable. I am asked to decide that there was a "payment" of this bonus upon the strength of what I consider bare machinery. I cannot do so. The fact is simply that the shareholder was given shares instead of a bonus.

The sections of the Act of 1842, to which we are remitted for super-tax purposes, dealt with the computation of income for exemption purposes, and it is at least permissible to look at this case as if it had arisen in that connection. Suppose this bonus share distribution had taken place, as no doubt many such did take place, a dozen years ago, before the introduction of super-tax, and one of the shareholders being a person of small income, within the exemption limit, had sought to recover income tax on the amount of the face value of his bonus shares. Would not the Revenue have justly objected that he had not in the language of s. 165 been charged to nor had he paid duty by way of deduction from any rent annuity interest or other annual payment? They would have said, in my judgment unanswerably, that the company had never parted with the money and that he had never received any payment out of which any deduction such as that he sought to recover could take effect.

I was properly pressed in the course of the argument with the case of *Swan Brewery Co.* v. *The King.* (1) There it was held that a shareholder receiving bonus shares, as in the present case, was receiving an advantage within the meaning of a highly artificial definition of the word "dividend" in a Colonial Act notwithstanding that his proportionate interest in the assets of the company remained the same after the transaction as it had been before. It was further recognized that such advantage was the same as that which he would have received, if he had been paid the bonus in cash and expended it in subscribing for the new shares. Here the question is whether he has been paid and in my opinion the decision has but little, if any, bearing.

For these reasons I am of opinion that the appeal of the Commissioners must be dismissed with costs, and as the decision disposes also of the case of *Commissioners of Inland Revenue* v. *Greenwood* the result will be the same in that case.

Appeals dismissed.

Solicitor for appellants in both cases: *Solicitor of Inland Revenue.*

Solicitors for respondent in first case: *Macdonald & Stacey.*

Solicitors for respondent in second case: *Norton, Rose, Barrington & Co.*

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(1) [1914] A. C. 231.

J. R.

[IN THE COURT OF APPEAL.]

LYLE-SAMUEL *v.* ODHAMS, LIMITED AND OTHERS.

[1918 L. 1416.]

C. A.
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July 30.

Practice—Discovery—Interrogatories—Action for Libel in Newspaper—Defence of Fair Comment—Names of Informants—Special Circumstances.

In an action of libel against the proprietors and publishers of a newspaper in respect of matter appearing therein at a time when the plaintiff was a candidate for Parliament, the defendants pleaded fair comment. The matter complained of consisted largely of an attack on the private character of the plaintiff, suggesting that he was unfit to be elected a member of Parliament. The plaintiff applied for leave to administer to the defendants interrogatories asking in substance what information the defendants had before publishing the words complained of and from whom they obtained the information. The plaintiff gave an undertaking that, if the names of the informants were disclosed, he would not bring any action against them. The judge in chambers disallowed that part of the interrogations asking from whom the defendants obtained the information:—

Held, upon the authority of *Plymouth Mutual Co-operative and Industrial Society* v. *Traders' Publishing Association* [1906], 1 K. B. 403, that the defendants, in the absence of special circumstances, could not, under the general rule of practice, in respect of matter published in their newspaper be compelled to give the names of their informants; and that neither the fact that the plaintiff gave an undertaking not to sue the informants, nor, in the circumstances of the case, the fact that the matter complained of was an attack on the private character of the plaintiff, constituted a "special circumstance" so as to take the case out of the general rule.

APPEAL from an order of Roche J. in chambers.

The action was for libel. The plaintiff was, at the date when the alleged libel was published, a candidate for Parliament for the Eye Division of Suffolk at the general election in December, 1918, and was subsequently elected.

The statement of claim alleged that the defendants, the National News Limited, owned and published, the defendants, the Victoria House Printing Company, Limited, printed and published, and the defendants, Odhams, Limited, distributed and published, a weekly newspaper entitled *The National News;* and that in the issue of the said newspaper dated Sunday, December 8, 1918, the defendants published the alleged

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libel. The statement complained of as libellous was headed "Clean Candidates," and it alleged that "there never was a time when the electors were called upon to scrutinize with more meticulous care the character and records of candidates. Upon the new House of Commons responsibilities of a momentous character will rest . . . . In this issue, acting as we do from a keen sense of public duty, we have thrown some light on the career of Mr. Lyle-Samuel" (the plaintiff), "who is the Coalition Candidate for the Eye Division . . . ." The statement then went on: "An unfitted candidate. Mr. Lyle-Samuel and the Eye Division. Past record of a Coalition nominee.

"Samuel.—In affectionate memory of Eva Louisa Samuel, late wife of Alexander Wenyon Lyle-Samuel, who departed this life at the London County Council Asylum, Colney Hatch, London, N., Aug. 11, 1914.—*Morning Post*, Aug. 10, 1918.

"Behind that 'in memoriam' advertisement lurks an unhappy domestic tragedy. But what is more it serves to remind us that the man whose wife died in the pauper lunatic asylum is to-day seeking the suffrages of the electors in the Eye Division as the coalition candidate." The newspaper then referred to the plaintiff's dealings with his first wife's money; to his being made bankrupt; to his financial operations; and it stated that he went to America and while he was there his wife died in a pauper lunatic asylum, that he then married in America a rich widow, that his bankruptcy was annulled, and that he returned to England and resided in Suffolk, from which position he "nursed" the Eye Division.

The statement of claim alleged that "by the words hereinbefore set out the defendants meant, and were understood to mean, that the plaintiff was an unscrupulous and dishonest adventurer, who had married his first wife solely for the sake of her money, had tricked her out of her money, had by his conduct driven her insane, and had then deserted her and left her to die in a pauper lunatic asylum, that he had married his second wife solely for the sake of her money, that he had engaged in company promoting transactions of a dishonest character, that he had an unclean record, that he was a person of ill repute, devoid of commercial integrity or decent instincts, and that by reason of the allegations above set out he was unfit to be elected a member of Parliament, and was unworthy of the trust or confidence of any respectable person."

The defendants pleaded (so far as material) justification and fair comment.

The plaintiff applied for leave to administer interrogatories for the examination of the several defendants. The interrogatories were in substantially the same form, those sought to be administered to the Victoria House Printing Co. being (so far as material) as follows: "1. Before publishing the words complained of had you any and what information with respect to the statements therein contained or any and which of them? *From whom and when and how was any such information obtained?* Identify all documents *and/or state the dates of, parties to, and substance of all interviews.* 2. Before publishing the words complained of did you take any and what steps to verify the truth of the statements complained of in this action or any and which of them, and/or did you make any and what inquiries with a view to ascertaining whether such statements or any and which of them were true or not? *Of whom and when and how were any such inquiries made?* Identify all documents, *and/or state the dates of, parties to, and substance of all interviews.* 3. Did you receive any and what answer or answers, *and from whom,* to any and which of the inquiries (if any) mentioned in your answer to the last preceding interrogatory? State the date or respective dates on which you received such answer or answers, and identify all documents, *and/or state the parties to and substance of all interviews.*"

The plaintiff gave an undertaking that, if the names of the defendants' informants were disclosed, he would not bring any action against them.

The master disallowed the portions of the interrogatories in italics, and Roche J. affirmed his order. (1)

The plaintiff by leave appealed.

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(1) It was stated that Roche J. acted upon a general rule of practice in the King's Bench Division in such a case as the present not to allow an interrogatory asking for the name of the defendants' informant.

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D. M. Hogg K.C. and *H. St. J. Field* for the plaintiff. For the purpose of the question in this appeal the relevant defence is fair comment. As a general rule, interrogatories as to the source of the defendants' information are admissible: *White & Co.* v. *Credit Reform Association* (1); *Elliott* v. *Garrett.* (2) The interrogatories in the present case are similar to those in *White* v. *Credit Reform Association* (1), where, the defence being privilege, an interrogatory asking the name of the person from whom the defendants obtained the information was allowed. In *Plymouth Mutual Co-operative and Industrial Society* v. *Traders' Publishing Association* (3), where the defence was fair comment, the Court of Appeal, upon the authority of *Hennessy* v. *Wright* (4) and *Hope* v. *Brash* (5), laid down an exception to the general rule to the effect that in an action against the publishers of a newspaper for a libel appearing therein the defendants could not, in the absence of special circumstances, be called upon by interrogatories to disclose the names of their informants. The plaintiff cannot in this Court deny that there is that exception to the general rule. But there are here special circumstances. First, the plaintiff through his counsel has undertaken, and now repeats the undertaking, if the names of the informants are given, not to bring any action against them. In the next place, the newspaper has gone outside its duty and the defendants have dragged in an attack on the plaintiff's private and domestic affairs. The proper function of a newspaper is to criticise a man's public career, and, it may be, a man's private character so far as it bears on his public career. In such a case it is against public policy that an interrogatory asking the name of the informant should be allowed. The criticism in the present case is entirely outside the province of a newspaper, and is not justified by any view of public policy. The real reason why the name of the informant is relevant is, not because he may have been malicious, but because he may not be reliable as a source of information.

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(1) [1905] 1 K. B. 653.
(2) [1902] 1 K. B. 870.
(3) [1906] 1 K. B. 403.
(4) (1888) 24 Q. B. D. 445 n.
(5) [1897] 2 Q. B. 188.

The learned judge in the present case acted on the rule that the publishers of a newspaper could not be compelled by interrogatories to disclose the names of their informants, and therefore no question of his having exercised any discretion arises.

Sir Hugh Fraser for the defendants. Odhams, Limited, and Victoria House Printing Co. There are no special circumstances to take the case out of the rule that the publishers of a newspaper containing the defamatory matter complained of need not disclose the names of the persons from whom the information was obtained. That the attack is on the private character of an individual is not a special circumstance to take the case out of the rule. If it were, the rule would become useless to publishers of newspapers, because it is impossible in many cases to separate a man's public from his private life, and in many cases it is material in the public interest that incidents in the private life of a public man should be known. Nor is the fact that the plaintiff has undertaken not to sue the informant a special circumstance. If it were, the plaintiff could always evade the rule by giving that undertaking. Moreover, the Court in the exercise of its discretion will disallow the portions of the interrogatories objected to: *Adam* v. *Fisher* (1); see also *Harle* v. *Catherall.* (2) In *Barham* v. *Lord Huntingfield* (3) Kennedy L.J. said that "the decision in *Elliott* v. *Garrett* (4) went as far as this Court ought to go in allowing interrogatories of this kind, especially when one bears in mind the more recent decision of this Court in *Maass* v. *Gas Light and Coke Co.*" (5)

Barrington-Ward K.C. and *du Parcq* for the defendants, *The National News*, Limited.

H. St. J. Field in reply. It is a special circumstance if the Court is satisfied, on perusal of the libel, that the defendants may have gone to unreliable sources for information, and if so it will allow the interrogatory. That is so in the present case.

(1) (1914) 30 Times L. R. 288; 110 L. T. 537.

(2) (1866) 14 L. T. 801, 802.

(3) [1913] 2 K. B. 193, 199.

(4) [1902] 1 K. B. 870.

(5) [1911] 2 K. B. 543.

BANKES L.J. This is an appeal from an order of Roche J. who affirmed an order of the master disallowing certain parts of interrogatories which the plaintiff seeks to administer. The action is for libel. There are three defendants, and the statement complained of as libellous appeared in a weekly newspaper called *The National News*. The defence is justification and fair comment. The interrogatories are administered with reference to the defence of fair comment, and their object is to ascertain what information the defendants had upon which they founded their comment, and the sources from which that information was obtained.

It is well established that in an action of libel against an individual—apart from any question of a newspaper—who pleads fair comment, it is permissible to interrogate him on both those matters for the purpose of ascertaining whether or not his comment was justifiable or whether he may not have been actuated by malice. That is the general rule. But it is also well-established, at any rate so far as this Court is concerned, that there is an exception to that rule in the case of newspapers. This exception is clearly stated in *Plymouth Mutual Co-operative and Industrial Society* v. *Traders' Publishing Association* (1), when this Court treated the exception as long established and as binding on the Court of Appeal. In that case Stirling L.J. said (2): "With regard to the seventh interrogatory, which asks from whom the defendants obtained the information on which they relied in publishing the alleged libel, I agree with my lord in thinking that the cases of *Hennessy* v. *Wright* (3) and *Hope* v. *Brash* (4) have laid down a rule from which we are not at liberty to depart, namely, that the Court ought not in such a case as this to compel discovery of the names of the persons from whom the information on which the defendants acted in publishing the alleged libel was derived, in the absence of special circumstances." He there stated that the exception, or as he called it the rule, was binding on this Court; and there would be little use in considering the grounds upon which the rule is based had it not been that counsel for the plaintiff founded an argument on the fact that, though the Court in that case had stated the rule as indicated by Stirling L.J., it had said that the rule was only binding in the absence of special circumstances. No indication is given in that case or elsewhere as to what constitutes special circumstances. The plaintiff's contention, as I understand it, comes to this, that special circumstances will exist in any case in which it can be shown that the alleged libel must necessarily be outside the grounds upon which the rule or exception, whichever it may be called, is founded. In order to deal with that contention it is necessary to consider the possible grounds upon which the rule or exception is based.

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(1) [1906] 1 K. B. 403.

(2) Ibid. 418.

(3) 24 Q. B. D. 445 n.

(4) [1897] 2 Q. B. 188.

The matter has already been considered in *Adam* v. *Fisher* (1), where Buckley L.J. said: "His Lordship had asked in the course of the argument why newspapers had been treated differently from other people in this matter. It seemed that two answers might be given. One was that it might be assumed that the object of getting the name of the informant of a newspaper was to sue the informant, which was plainly improper." Pausing there, I cannot see that that reason is more applicable in the case of a newspaper than in any other case. It seems to me that it is difficult to draw a distinction between the case of publication in a newspaper and any other case. The Lord Justice went on: "The second answer was that a newspaper stood in such a position that it was not desirable on grounds of public interest that the name of a newspaper's informant should be disclosed." It may be that in that passage the Lord Justice was alluding to what is compendiously spoken of as the freedom of the press; that it is in the public interest to maintain the freedom of the press; and that it would be difficult to maintain that freedom if the editor of a newspaper felt that he might be compelled to disclose the name of the person upon whose information he was acting in making the comment or inserting the statement. I do not know whether that is what the Lord Justice was referring to, but it is not necessary to discuss the rule, or the wisdom of it, or, except for the purpose of dealing with Mr. Hogg's argument, the grounds upon which it is founded. Mr. Hogg put forward a somewhat different reason for the rule. As I understand him, his suggestion is this—that the foundation of the rule is that it is or may be in the public interest that newspapers should be at liberty freely to criticise the conduct and private character of individuals, but only in cases where such conduct and character affect their fitness for some public position; and, assuming that to be the foundation of the rule, he went on to contend that special circumstances must exist where it is shown that the case is not covered by that ground, and that the present case is not so covered because the Court can see, on reading the alleged libel, that it is an attack on the private character and private life of the plaintiff, entirely unwarranted from any point of view of the desirability of publishing statements in the public interest.

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(1) 30 Times L. R. 288.

Whether that criticism of the language of the alleged libel is or is not justified depends upon the meaning which is placed upon the language used. It is true that by an innuendo the plaintiff suggests that the language complained of means that he was an unscrupulous and dishonest adventurer who married his first wife solely for her money, and that he tricked her out of her money, and by his conduct drove her insane. But it is not for this Court to decide an issue which is one for the jury to decide, nor can we say that special circumstances exist in the present case for not applying the well-established exception. I am unable to accept Mr. Hogg's suggestion as to what constitutes special circumstances, or to agree that the test which he suggests is the correct one. Mr. Field suggested another test as to what constitutes special circumstances, his suggestion being that special circumstances exist when the Court is satisfied by perusal of the libel that the defendant may have gone to an unreliable source for the information. I fail to see how the Court can ascertain by perusal of the libel that in this particular case the defendants may have gone to an unreliable source. They may or may not; it is not for me to say what the libel means, or as to the good taste or justice of writing such articles as are here complained of. All I say is that this is an action of libel against the publishers of a newspaper, that it is well established that in the case of newspapers there is an exception to the rule requiring a defendant to disclose the source of his information where he pleads either privilege or fair comment. I am unable to accept either of the tests suggested as to what constitutes special circumstances, and I cannot by applying any test of my own see that there are special circumstances in this case.

Upon these grounds I think that the appeal should be dismissed.

SCRUTTON L.J. The question in this appeal is shortly this: In an action for libel against the proprietors and publishers of a newspaper, who plead fair comment, is it admissible to administer interrogatories to the defendants to ascertain, not only the information which they had when they published the libel, but also from whom they obtained that information.

It has been clearly decided that interrogatories as to what information and materials the defendants had are admissible questions where privilege or fair comment is pleaded. In the case of privilege the information which the defendants had in their possession when they made the statements may obviously be relevant to the proof of malice which would destroy the privilege; and in the case of fair comment, a comment, which may be objectively and prima facie fair, may become unfair if made with a malicious motive. Therefore in either case it has been held that it is relevant to the issue to ask what information was in the possession of the person responsible for the libel. If one approached the question unfettered by authority, it seems to me that on principle there would be a great deal to be said for allowing the name of the informant to be asked in a case like the present. It seems to me that in questions of malice it would ordinarily be relevant to ask, not only what the defendant knew when he published the libel, but also who told him. The informant may be a person who has been convicted of perjury, or a well-known libeller who has frequently been cast in damages; he may be a person of such a character that, if called as a witness, any jury would say that anyone who acted on that person's information deserved whatever happened to him. If the matter had been free from authority I should have thought that there was a great deal to be said for the proposition that the name of the informant was as relevant as the information which he gave, unless it could be said that there was sufficient public policy in allowing newspapers to make attacks on people without imposing any obligation on them to disclose the name of the person from whom the materials for those attacks were obtained to override what otherwise would seem to be a matter of principle. But it is said that the practice in the King's Bench Division has established a rule under which interrogatories such as these are not allowed in the case of libels in newspapers.

On looking at the authorities I find that in 1888, more than thirty years ago, in a libel action brought by Sir John Pope Hennessy, the Governor of Mauritius, against the publisher of *The Times*—*Hennessy* v. *Wright* (1)—in which fair comment was pleaded, similar interrogatories to those in the present case were delivered. While Lord Esher M.R. and Lopes L.J., the two common law members of the Court, did not say anything in their judgments about the rule, Lindley L.J. said this (2): "The judges of the Queen's Bench Division have arrived, as I understand, at a tolerably settled practice never to order production of such documents as this for reasons which I appreciate, although perhaps I should not have given effect to them in the first instance. Although, therefore, I have some doubt whether, looking at it as a pure question of principle, the plaintiff is not entitled to a further answer to the eighth interrogatory, I do not dissent from the view of my learned brethren that there are considerations on the other side which are entitled to greater weight." It is fairly obvious that, although Lord Esher and Lopes L.J., who were very familiar with the nisi prius practice, did not in their judgments say anything about the rule, they were the sources of the information on which Lindley L.J. stated that there was that rule. It is made fairly clear in *Hope* v. *Brash* (3) in 1897, where

(1) 24 Q. B. D. 445 n.
(2) Ibid. 449 n.
(3) [1897] 2 Q. B. 188.

the Court was composed of Lord Esher M.R., A. L. Smith and Rigby L.JJ. Lord Esher, referring to *Hennessy* v. *Wright* (1), said (2): "Lindley L.J., after being informed that the general practice of the judges of the Common Law Courts had been for a long series of years not to order inspection in such a case, or to force the defendant to disclose who gave the information on which the libel was published, accepted that practice as binding upon him, and did not dissent from the view taken by myself and Lopes L.J. Therefore in that case the Court of Appeal recognised the existence of a general rule that inspection of such a document as this should not be given to the plaintiff in an action for libel. It is not necessary to say that the Court will never under any circumstances allow such inspection, but, in the exercise of its discretion, it will not, as a general rule, in the absence of any special reason to the contrary, allow it."

Lastly comes *Plymouth Mutual Co-operative and Industrial Society* v. *Traders' Publishing Association* (3), where Vaughan Williams L.J., after having discussed the authorities, said (4): "The question which we have to ask ourselves is whether there are any special circumstances in this case which would justify a departure from the general rule of practice as to not compelling the disclosure of the names of the persons who supplied the information on which the alleged libel was based in cases of this kind, where the proprietors of a newspaper or other periodical publication set up a defence such as is here pleaded." Stirling L.J. used similar language (5): "A rule from which we are not at liberty to depart." And Fletcher Moulton L.J., apparently thinking that it was relevant, declined at that stage to order the information to be given.

I think that there is in these three decisions of the Court of Appeal, spread over a period of 30 years, a recognition of a settled rule of practice in the King's Bench Division applying to alleged libels published in newspapers, and not applying to

(1) 24 Q. B. D. 445 n.
(2) Ibid. 191.
(3) [1906] 1 K. B. 403.
(4) Ibid. 415.
(5) Ibid. 418.

alleged libels published elsewhere. Whatever I may personally think of the desirability or undesirability of such a rule, I do not think I am at liberty to depart from a rule of practice which has been acted upon for over 30 years and recognised in three judgments of this Court. I could have wished that the learned judges in the *Plymouth Case* (1), who stated the rule, and who said that special circumstances might justify an exception from it, had given a little information as to what kind of special circumstances they thought might justify a departure. In this case three have been suggested to us by counsel for the plaintiff. It is said that there is an undertaking not to sue the persons whose names are asked for, and that that undertaking is a special circumstance which will justify the Court in ordering the names to be given. I agree with my lord that that cannot be the reason for a greater privilege being accorded to the proprietors or publishers of newspapers than to other persons, and I do not think that that can be a special circumstance enabling us to depart from the rule. It is said next that the rule only applies to enable newspapers freely to criticise public men in those respects which relate to their public lives, and does not apply to an attack on their private lives. I think that this contention fails on the ground of fact. The private life of a member of Parliament may be material to his fitness to occupy his public office. His private life may be such as to show that he is quite unfit to exercise any public functions or to occupy any public office. Thirdly, it is said that there is a special circumstance in this case, in that, by looking at this alleged libel one can extract from it that the defendants must have acted on unreliable sources for their information. All I can say is that, having looked at the libel, I find myself unable to extract that from it, and that contention fails.

Therefore, feeling myself bound by the previous decisions of this Court, whatever my view might have been had I approached the question unfettered by authority, and finding nothing that I can see to be a special circumstance in any way weakening the effect of the rule, I agree that the appeal must be dismissed.

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(1) [1906] 1 K. B. 403.

Appeal dismissed.

Solicitors for plaintiff: *Field, Roscoe & Co., for Ansell & Sherwin, Birmingham.*

Solicitor for defendants: *John T. Monks.*

W. F. B.

FRAILEY *v.* CHARLTON.

1919
July 31.

Revenue—Customs—Exporting prohibited Goods—Intent to evade Prohibition—Customs Consolidation Act, 1876 (39 & 40 *Vict. c.* 36), *s.* 186.

To constitute the offence of "knowingly harbouring prohibited goods" under s. 186 of the Customs Consolidation Act, 1876, it is not enough that the party charged had such goods in his possession with intent to convey them out of the United Kingdom, he must have done so "with intent to evade the prohibition."

The respondent, a ship's steward, had on board his ship while lying in the Thames preparatory to her departure for a foreign port a quantity of soap, which was intended for the use of the passengers on the voyage. The export of soap was prohibited by Royal Proclamation, but the respondent was not aware of the fact of that prohibition. On an information against him under the above section for harbouring the soap:—

Held, that his ignorance of the prohibition afforded a good defence.

CASE stated by a metropolitan police magistrate.

An information was laid by the appellant, an officer of Customs, against the respondent F. D. Charlton charging that he knowingly harboured certain prohibited goods, to wit ten pounds of soap, on board the s.s. *Purfleet Belle* contrary to s. 186 of the Customs Consolidation Act, 1876, which imposes a penalty upon "every person who shall . . . . knowingly harbour . . . . or knowingly permit or suffer, or cause or procure to be harboured . . . . any prohibited, restricted, or uncustomed goods."

By s. 3 (*b*) of the Trading with the Enemy and Export of Prohibited Goods Act, 1916 (6 & 7 Geo. 5, c. 52), it is declared that "in s. 186 of the Customs Consolidation Act, 1876 . . . . the references to prohibited or restricted goods and to any prohibitions and restrictions includes (except where the context otherwise requires) references to goods, the exportation of which is prohibited or restricted, and to prohibitions and restrictions on the export of goods."

By s. 1, sub-s. (1.) of the Customs (War Powers) Act, 1915, (5 Geo. 5, c. 31), it is provided that "Where any goods are prohibited either to be exported or carried coastwise, or any goods are prohibited to be exported to any named country or place, it shall not be lawful for any person to ship as stores on any vessel any of the goods to which the prohibition extends, except such quantity of any of those goods as may be allowed to be so shipped by the proper officer of Customs and Excise as being reasonably required to be shipped at the port of departure for use on board the vessel during the voyage on which it is about to depart"; and by sub-s. (2.) "If any person ships as stores any goods . . . . in contravention of this section the goods shall be forfeited and he shall for each offence be liable to a penalty of 100*l*." By s. 2 "The powers of the Commissioners of Customs and Excise under s. 139 of the Customs Consolidation Act, 1876, by order to require due entry and clearance before shipment shall apply to goods intended for shipment as stores on any ship being goods subject to any prohibition or restriction outwards, as it applies to goods intended for exportation or carriage coastwise."

By s. 8 of the Customs and Inland Revenue Act, 1879 (42 & 43 Vict. c. 21), it was enacted that certain specified goods "may by proclamation or Order in Council be prohibited either to be exported or carried coastwise."

By s. 1 of the Exportation of Arms Act, 1900 (63 & 64 Vict. c. 44), "It shall be lawful for Her Majesty by proclamation to prohibit the exportation of" certain specified articles "to any country or place therein named."

By the Customs (Exportation Restriction) Act, 1914 (5 Geo. 5, c. 2), the power to prohibit by proclamation the export of certain articles is extended to "all other articles of every description."

By a Royal Proclamation dated May 10, 1917, as amended by an Order in Council dated February 26, 1918, the exportation of soap from the United Kingdom to all destinations was prohibited, and that prohibition continued in force at the material date.

At the hearing the following facts were proved or admitted: —On October 7, 1918, an entry of the stores required on the *Purfleet Belle* was delivered to the proper officer of Customs and Excise, in which the quantity of toilet soap entered for shipment was twelve tablets. Permission was given by the said officer to ship twelve tablets, but no more. The *Purfleet Belle* arrived in the Port of London on October 5, 1918, and left again outward bound for Rotterdam on October 16. The respondent was chief steward on the said vessel. On October 15 an officer of Customs and Excise went on board the *Purfleet Belle* which was then lying near Cherry Garden Pier in the River Thames and proceeded to search the vessel. In the storeroom cupboard he found thirty tablets of toilet soap in addition to the twelve tablets for the shipment of which permission had been given. The respondent admitted that the thirty tablets belonged to him. He said he had bought them for the use of the passengers. They were of better quality than the twelve tablets. Passengers had previously grumbled about the quality of the soap supplied. On a voyage to Rotterdam and back from 24 to 30 cakes of soap were ordinarily used. The soap was not intended for Rotterdam. The respondent did not know of the prohibition against the export of soap.

The magistrate held that the soap in question was not intended to be exported to any foreign destination but was intended to be used on the ship. He was of opinion that the proclamation and the statutes authorizing it had no application to goods shipped as ship's stores for the purpose of consumption in the ship. He was further of opinion that the offence of knowingly harbouring goods under s. 186 of the Customs Consolidation Act, 1876 (1), involved an intention to contravene the prohibition, and that there was no intention by the respondent to contravene the proclamation by exporting the soap. He was further of opinion that the offence, if any, committed by the respondent was that created by s. 1, sub-s. (2.) of the Customs (War Powers) Act, 1915, cited above.

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(1) By s. 186 of the Customs Consolidation Act, 1876, "Every person who shall import or bring or be concerned in importing or bringing into the United Kingdom any prohibited goods or any goods the importation of which is restricted contrary to such prohibition or restriction whether the same be unshipped or not; or shall unship

Giveen (*Sir Gordon Hewart A.-G.* with him) for the appellant. The magistrate was wrong in thinking that the prohibition did not apply to this soap because it was intended to be used as ship's stores. It was not in fact ship's stores, for no permission to ship it had been obtained, and, that being so, the use to which it was intended to be put was quite immaterial. The commission of the offence of harbouring prohibited goods under s. 186 of the Act of 1876 is independent of any intent to contravene the prohibition. The provision in that section that an offence shall be committed if the act be done "with intent to . . . . evade any prohibition or restriction of or applicable to such goods," is to be read in connection with the immediately preceding words above—"or shall be in any way knowingly concerned in carrying, removing, depositing, concealing, or in any manner dealing with any such goods." The condition as to intent was introduced for the purpose of qualifying the very general language of the immediately preceding sentence, and was not intended to apply to the offence of knowingly harbouring prohibited goods, or to any

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or assist or be otherwise concerned in the unshipping of any goods which are prohibited . . . . or shall knowingly harbour keep or conceal or knowingly permit or suffer or cause or procure to be harboured kept or concealed any prohibited restricted or uncustomed goods . . . . or shall knowingly acquire possession of any such goods; or shall be in any way knowingly concerned in carrying removing depositing concealing or in any manner dealing with any such goods with intent to defraud Her Majesty of any duties due thereon or to evade any prohibition or restriction of or applicable to such goods; or shall be in any way knowingly concerned in any fraudulent evasion or attempt at evasion of any duties of Customs or of the laws and restrictions of the Customs relating to the importation unshipping landing and delivery of goods or otherwise contrary to the Customs Acts; shall for each such offence forfeit either treble the value of the goods including the duty payable thereon or one hundred pounds at the election of the Commissioners of Customs."

other of the various offences created by the earlier paragraphs of the section. Moreover, the magistrate was wrong in finding that the respondent had no intent to evade the prohibition. He did so apparently upon the ground that the respondent had no knowledge of the existence of the proclamation. But that is no defence. Every man is bound to know the law, and the contents of a proclamation made under the authority of a statute constitute a part of the law. The respondent must be treated as being in the same position as if he knew of the prohibition against the export of soap.

C. E. Jones for the respondent. The words " with intent to evade any prohibition " must not be read as applicable only to the offence created by the immediately preceding words, but as applying equally to all the other offences in the section. Such an intent is therefore a condition of the offence of harbouring prohibited goods. No doubt in order to satisfy the rule as to the necessity of proving a mens rea in criminal cases it is in general enough to show that the person charged knew the facts constituting the offence, and it is no answer for him to prove that he did not know of the statute creating it. And if here the section had not contained the words " with intent to evade any prohibition " it may be that the respondent's ignorance of the prohibition would have afforded no defence. But on the issue whether he in fact had such an intent his ignorance of the proclamation must be material.

Giveen in reply.

EARL OF READING C.J. In this case the respondent was charged with knowingly harbouring certain prohibited goods in contravention of s. 186 of the Customs Consolidation Act, 1876, and the question we have to consider is whether the magistrate was justified in dismissing the information upon the ground that the respondent had no intention to disobey the Proclamation and Order in Council by which the goods were prohibited. For the purpose of the point on which I propose to decide the case it is enough to say that the export of soap was prohibited by Proclamation, and the penalty for infringing the Proclamation was contained in s. 186 of the

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Customs Consolidation Act, 1876. It appears that the respondent had thirty tablets of soap on board his ship, and that he took them there with the intention of carrying them outside the jurisdiction. I will assume for the purposes of the case that he intended to export them. Under those circumstances, having regard to the finding of the magistrate that he had no intent to evade the prohibition, can he be convicted of an offence under s. 186? In my opinion he cannot. Sect. 186 is one of a series of sections beginning with s. 169, which were designed for the prevention of smuggling. Then when war was declared and it became necessary to prohibit the export as well as the import of goods, it was found convenient instead of passing a new statute to amend the existing statute by bringing within its ambit various classes of goods, the exportation of which was prohibited by Proclamation. Now I cannot read s. 186, more especially when I find it, as I have said, in a group of sections for the prevention of smuggling, without coming to the conclusion that an offence is not committed under it unless the act complained of is done with intent to defraud the revenue of customs duties or to evade a prohibition against export as the case may be. Mr. Giveen has contended that the words "with intent to defraud Her Majesty of any duties due thereon, or to evade any prohibition or restriction of or applicable to such goods" were intended to be read only with the words that immediately precede them —"or shall be in any way knowingly concerned in carrying, removing, deporting, concealing, or in any manner dealing with any such goods"—as a restriction upon the generality of that language. But the language of the earlier paragraphs of the section creating other offences in connection with the smuggling of goods is equally general, and there is no reason why the above restriction upon the generality of the language should not equally apply to them. At the beginning of the section it is provided that "Every person who shall . . . . be concerned in importing or bringing into the United Kingdom any prohibited goods . . . . or shall unship, or assist or be otherwise concerned in the unshipping of any goods which are prohibited" shall be guilty of an offence. Those words are of most general application, and if they are to be read as standing alone, without reference to the later restriction as to an intent to defraud or evade, the result would be that an innocent labourer who helped to unship a barrel or an innocent merchant who took delivery of it on the quay side, provided he knew what the particular goods were with which he was dealing, would be liable to be convicted notwithstanding that he was entirely ignorant of the fact that there was a prohibition or restriction upon their import. I come to the conclusion that the words "with intent," etc., must be read as applying to all the various offences created in the earlier parts of the section including that with which the respondent is charged. Any other interpretation would be doing violence to the language. In my view the meaning of the Legislature was that no person should be convicted of an offence under that section or be subjected to the serious penalty which it imposed, unless the act complained of was done with intent to defraud His Majesty of duties and to evade the prohibition or restriction applicable to the goods. I think the magistrate was right and that this appeal must be dismissed.

DARLING J. I am of the same opinion. This is a penal section which makes it an offence to do certain acts in connection with prohibited goods including that of harbouring them, which is the offence charged against the respondent. Now towards the end of the section occur these words "or shall be in any way knowingly concerned in carrying, removing, depositing, concealing, or in any manner dealing with any such goods with intent . . . . to evade any prohibition or restriction of or applicable to such goods." It is perfectly plain that any one doing any of those things may set up the defence that he did not do them with intent to evade any prohibition; and it is obvious that he cannot prove the absence of an intent to evade the prohibition better than by proving that he did not know of its existence. It has been argued that it is only to a charge of doing one of those particular things there mentioned that the absence of such intent affords a defence. But I cannot so read the section. In the immediately preceding sentence I find the words "or shall knowingly acquire possession of any such goods." If the Crown's contention is right then upon mere proof that a man is in possession of prohibited goods he must be convicted, although he did not know that they were prohibited and bought them perfectly honestly in a shop. Again at the beginning of the section it is provided that "every person who shall . . . . unship or assist or be otherwise concerned in the unshipping" of prohibited goods commits an offence. According to the argument of the Crown a man who has been concerned in the unshipping of such goods would not be allowed to prove that he had no intent to evade the prohibition, whereas one who has been "concerned in carrying removing or depositing" them would. The strangeness of such a result compels me to the conclusion that the condition as to intent applies not merely to the particular offences created by the paragraph in which the condition occurs, but to all the various offences created by the section. I agree that the appeal fails.

AVORY J. I am of the same opinion. I only wish to add that I think the view which the Court has expressed as to the reading of the section is supported by reference to the concluding words of it—" or shall be in any way knowingly concerned in any fraudulent evasion or attempt at evasion of any duties of Customs or of the . . . . restrictions of the Customs relating to the importation . . . . of goods." Having provided that persons who do the acts specified in the section with intent to evade shall be liable, the section goes on to provide that persons knowingly concerned in any fraudulent evasion shall also be liable. That makes a complete and logical code. The result of the argument is to strengthen the view taken by the magistrate that the offence, if any, committed by the respondent was that created by s. 1 of the Customs (War Powers) Act, 1915.

Appeal dismissed.

Solicitor for the appellant: *Solicitor of Customs and Excise.*
Solicitor for the respondent: *W. Daybell.*

J. F. C.

THE KING (ON THE PROSECUTION OF JOHN WHITTOME) *v.* MARSHLAND SMEETH AND FEN DISTRICT COMMISSIONERS.

1919
July 23, 24, 25, 29, 30, 31.

Mandamus—Return to Writ—Reply—Breach of statutory Duty—Damages—Crown Office Rules, 1906, *r.* 125—*Public Authorities Protection Act,* 1893 (56 *&* 57 *Vict. c.* 61), *s.* 1—*Commencement of Proceedings—Continuance of Damage.*

By 36 Geo. 3, c. 100, it was enacted that a certain district should be effectually drained and that commissioners, to be appointed under the Act, should be authorized and empowered to take such steps for draining the district as they should judge proper and expedient and to raise money for that purpose by rates on the landowners in the district.

On the application of an owner of land in the district (hereinafter referred to as the plaintiff), who alleged that the commissioners had failed to drain the district effectually, the Divisional Court issued a writ of mandamus which, after reciting that the commissioners had neglected to drain the district effectually, commanded them to do so. The commissioners by their return to the writ alleged that they had carried out the order of the Court to the best of their ability. The plaintiff by his reply to the return joined issue thereon, and claimed damages for injury sustained by his land through the commissioners' neglect to drain the district. On the trial of these issues:—

Held, that the defendants were entitled to contend that the writ of mandamus should not have been issued, but that, as the Act imposed an imperative duty on the defendants to drain the district effectually, which duty had not been performed, the writ had been rightly issued; and that the plaintiff could recover in these proceedings the actual damage which he had sustained.

Held, also, that the Public Authorities Protection Act, 1893, applied to the proceedings, and that the motion for the rule nisi was the commencement of the proceedings for the purposes of that Act, but that as there had been a continuance of the breach of duty and of the damage, the damages were not limited to those incurred in the six months before the commencement of the proceedings.

TRIAL of issues of fact and questions of law arising on a reply to a return to a writ of mandamus and a rejoinder thereto.

The facts as stated by McCardie J. in his written judgment were as follows:—

"In the west of Norfolk there is a district which I will call Marshland Smeeth. The area is about 7500 acres. Situate in that district is a farm of 370 acres called Crown Farm. It is owned by Mr. Whittome, the originator of these proceedings. It will be convenient to refer to him hereafter as the plaintiff. In the year 1795 the district was an area of common and waste lands. Floods were usual and agriculture was difficult for want of proper land drainage. The land was therefore of little benefit to those who possessed rights of common thereon. Hence Parliament passed a public Act in 1796 which I will call the Marshland Smeeth and Fen District Act, 1796 (36 Geo. 3, c. 100). It constituted a body who are now known as ' The Marshland Smeeth and Fen District Commissioners.' It will be convenient to refer to them hereafter as the defendants. In view of the contention of counsel for the defendants that the powers given by the Act of 1796 were permissive rather than imperative it is essential to refer briefly to the directly relevant sections. By s. 1 it was provided (after a recital of the circumstances) as follows : 'Be it enacted that the said tracts of common and waste lands, called Marshland Smeeth and Marshland Fen, shall be effectually drained, and that the same shall be stinted and regulated, set out, inclosed, divided and allotted, by such commissioners, in such manner and under such powers and authorities, and subject to such rules, orders and directions, as are hereinafter appointed, mentioned and declared.' By s. 2 it was, in substance, provided that every owner of 50 acres of land within the district should ipso facto be appointed a commissioner for drainage so far as related to the drainage of the district. The result of the provision is that the plaintiff is and has been a commissioner for many years past. By s. 15 it was provided that the commissioners ' shall be and they are hereby fully empowered from time to time to drain or cause to be drained ' the said district, and they are ' hereby authorized and empowered from time to time ' to take all such steps for the purpose of draining the district as the commissioners ' shall judge proper and expedient.' By s. 32 it was provided : ' That if any person or persons shall, without an order made by the said commissioners for drainage, at some or one of their meetings, which said order the said commissioners may at any time rescind, erect, set up, use or work any horse, mill, gigg or other engine or device whatsoever, for draining or discharging water from any lands in the said Smeeth and Fen, or either of them, every such person shall, for every such offence, forfeit the sum of 50*l.* to any person who will sue for the same.' By s. 94 it was enacted: 'That if any person or persons shall think himself, herself, or themselves aggrieved by anything done in pursuance of this Act' then, in certain cases, an appeal can be brought to the general quarter sessions for the county of Norfolk. Those are the provisions, so far as are really material to the points before me, of the Act of 1796. I may, however, mention that the Act contains (see s. 22) powers to the commissioners to assess and levy equal and proportionate sums of money on each owner by way of rates or charges for the expenses of maintaining the works, etc., and making any necessary alterations or enlargements. By a further Act passed in 1849 (12 & 13 Vict. c. xviii.), it was provided (s. 8) that the rates and charges should not exceed 3*s.* 6*d.* an acre per year, and by a still later Act passed in 1863 (26 Vict. c. xlviii.) this amount was raised to 10*s.* per acre in the whole for any one year. These two Acts of 1849 and 1863 also contained certain powers of mortgage for the purposes of the Acts. I am informed, however, that these powers were exhausted some years ago. The actual rate per acre now existing is 5*s.* only. Hence the defendants have a reserve rating power which, on the acreage within their jurisdiction, would produce an additional sum of no less than 1700*l.* a year or thereabouts. The only other statutory provisions which may perhaps call for mention are s. 7 of the Act of 1849, which gives full power to the Commissioners to erect and use steam-engines and the like for the purposes of drainage, and s. 5 of the Act of 1863 which made the commissioners a corporate body. So much for the Acts of Parliament governing the defendant's powers and duties.

"In the year 1907 the plaintiff began actively to complain to the defendants that they had failed to fulfil their drainage duties under the Acts I have already mentioned, and that as a result his Crown Farm (then in the occupation of a tenant) suffered from flooding and was waterlogged for substantial periods. The cogency of his complaints increased. In 1914 his tenant left and he, the plaintiff, then took possession of his farm and managed it on his own account. Nothing resulted from his complaints, and hence on May 23, 1917, he obtained a rule nisi from the Divisional Court (consisting of the Lord Chief Justice, Avory and Shearman JJ.) calling on the defendants to show cause why a writ of mandamus should not issue commanding them pursuant to the statutes in that behalf to drain effectually the Marshland Smeeth and Fen District on the ground that it is their duty under the Marshland Smeeth and Fen District Acts, 1796, 1849 and 1863, to drain effectually the whole of the said district including the farm of John Whittome. In October, 1917, the defendants appeared by counsel to show cause against the issue of the writ of mandamus. Affidavits had been filed on both sides. The plaintiff contended that the defendants had failed to fulfil their statutory duties. The defendants submitted that they had discharged those duties. Detailed questions of fact arose. Thereupon the Court (consisting of Darling, Avory and Sankey JJ.) decided that in view of the conflict of fact it would be desirable to obtain the opinion of an independent engineer to be appointed by the President of the Institution of Civil Engineers. Mr. R. F. Grantham was the gentleman so appointed. He duly reported in March, 1918. I need not at present deal with the contents of that report except to say that Mr. Grantham deemed that the commissioners might reasonably be called upon to carry out, in spite of war time conditions, certain specified works in order to drain effectually their district. The adjourned hearing of the arguments which had commenced in October, 1917, were resumed on June 24, 1918. As a result the Divisional Court (consisting of Avory, Shearman and Sankey JJ.) directed that the rule should be made absolute and that a writ of mandamus should be issued to the defendants. The writ, dated July 30, 1918, recites (inter alia) that the Court had been given to understand and was informed that the Crown Farm had not for many years and was not then and is not now effectually drained, that the commissioners had been required by John Whittome to drain the said district pursuant to the statutes but that the commissioners, not regarding their duty, had neglected and refused to drain effectually the district, and that great damage and grievance to the said John Whittome had been thereby caused. The operative words of the writ are these: 'Do command you the said Marshland Smeeth and Fen District Commissioners and every one of you firmly enjoining you that you do drain effectually the Marshland Smeeth and Fen District pursuant to the statutes in that behalf or that you show cause to the contrary thereof lest by your default the same complaint should be repeated to us and how you shall have executed this our writ make known to us in our said Court at the Royal Courts of Justice, London, on or before the 14th of October next then returning to us this our said writ and this you are not to omit.' It will be observed that the writ does not specify any particular works for execution by the defendants. It is general in its requirement. It calls on the defendants to drain the district effectually. This form of requirement seems to be in accordance with established practice. See *Rex* v. *Bristol Dock Co.* (1); Kennedy and Sandars on Land Drainage, published 1884, at pp. 177 and 178; Short and Mellor on Crown Office Practice, 2nd ed., p. 212.

"On October 26, 1918, the defendants filed their answer to the writ. It is divided into seven heads which I summarise as follows: (1.) That they have to the best of their ability carried out the order of the Court and the recommendations of Mr. Grantham except as to specified portion thereof. (2.) That that specified portion could not reasonably be executed at that time owing to labour difficulties. (3.) That the farm of John Whittome has always been and is now effectually drained. (4.) That the commissioners have not failed in their duty as alleged or at all. (5.) That the commissioners have at all times in strict and diligent discharge of their duty under the Acts and with due and just regard to the interests of all the landowners, occupiers, ratepayers and all others in the said district used every endeavour to drain effectually and have effectually drained the said land of John Whittome and others to the best of their judgment, skill and ability. (6.) That John Whittome has suffered no damage through the default of the commissioners. (7.) That any damage caused to John Whittome was not due to any default of the commissioners but to his own default in not keeping clear his ditches and in obstructing tunnels and culverts on his own land.

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(1) (1827) 6 B. & C. 181.

"To the above return the plaintiff delivered a reply or traverse on December 24, 1918. It is as follows: '(1.) The prosecutor joins issue upon the said return save as to any admissions therein contained. (2.) The prosecutor will submit that para. 5 thereof is bad in law on the ground that the duty therein alleged is not the duty imposed by the Marshland Smeeth and Fen District Acts, 1796, 1849 and 1863. (3.) The prosecutor will on the trial claim damages or an inquiry that the damage may be assessed on the basis that the matters complained of cause and have caused a continuance of injury and damage to the prosecutor.' The plaintiff has delivered particulars of his damage through the alleged defaults of the defendants. They cover the years 1914 to 1919. Detailed items are given for the years 1916 to 1919 in respect of loss to crops and the like through flooding and waterlogging and the results thereof. General damages for injury to the land are also claimed. The total damages demanded are large.

"The final pleading in the matter is the defendants' rejoinder. It was delivered on July 5, 1919, and is as follows: 'Rejoinder to prosecutor's reply to defendants' return to writ of mandamus dated July 30, 1918. The matters complained of herein consist of an alleged neglect or default in the execution of the Marshland Smeeth and Fen District Drainage Acts, 1796, 1849 and 1863 and the defendants' public duty and authority as drainage commissioners under the same and the prosecution and proceedings herein were not commenced within six months after the alleged acts or neglect or default complained of and within six months of the ceasing of any continuing injury or damage. And the alleged cause of prosecution, complaint, action and proceedings are barred by the Public Authorities Protection Act, 1893.' That is the curious record which comes before me for trial."

Ryde K.C. and *G. A. Scott* for the plaintiff. The Act of 1796 imposed on the defendants an absolute obligation to drain the district effectually, though the particular method to be employed is left to their discretion. The Divisional Court in making absolute the rule for a mandamus decided that that was the legal effect and construction of the Act and their decision on that point cannot be questioned. The plaintiff is entitled to recover in these proceedings the damages which he has suffered by reason of the defendants' failure to perform their statutory duty both before and since the issue of the writ of mandamus, even if, which is not admitted, the damages could not be recovered in an ordinary civil action: *Reg.* v. *Fall.* (1) The mandamus is only granted on the assumption that there has been a breach of duty. The Act 9 Anne, c. 20, s. 2, gave a right to recover damages on a return to a writ of mandamus in certain cases, and this was extended by 1 Will. 4, c. 21, to all other cases of mandamus. Both these Acts were repealed by the Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 Vict. c. 49, s. 3), but the practice remains in force by virtue of r. 125 of the Crown Office Rules, 1906: *Reg.* v. *Pirehill North Justices.* (2)

The defendants have pleaded the Public Authorities Protection Act, 1893. It is doubtful whether that Act applies to mandamus proceedings: *Rex* v. *Port of London Authority* (3), but if it does it affords no protection to the defendants in this case, for the damage has been continuing and had not ceased at the commencement of these proceedings.

Rawlinson K.C. and *F. K. North* for the defendants. There is no reported case in which such a claim as this has been made. A prosecutor in mandamus can recover such damage as he has incurred by reason of a false return to a writ of mandamus, but he cannot, by a plea to the return, recover damages for the alleged breach of duty in respect of which the mandamus has been granted. There has in fact been no breach of duty by the defendants. The Act of 1796 leaves it to the defendants to decide in their discretion what steps shall be taken to drain the district: *Rex* v. *Ouse Bank Commissioners.* (1) There is no right of action against the defendants for a breach of their statutory duty; the remedy is by appeal to quarter sessions under s. 94 of the Act of 1796. This Court is not precluded by the decision of the Divisional Court making absolute the rule for a mandamus, from considering whether there has been any breach by the defendants of their statutory duty: *Rex* v. *Margate Pier Co.* (2); *Rex* v. *London Corporation* (3); *London Corporation* v. *Reg.* (4); *Clarke* v. *Leicestershire and Northamptonshire Canal Co.* (5) The Public Authorities Protection Act, 1893, applies. This is not a case of continuing damage for the damage only occurs at certain seasons of the year, and the plaintiff can, therefore, only recover for damages suffered within six months of the commencement of the proceedings, that is to say, the delivery of the plea to the return to the mandamus.

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(1) (1841) 1 Q. B. 636.

(2) (1884) 14 Q. B. D. 13.

(3) [1919] 1 K. B. 176.

Ryde K.C. in reply. If the Divisional Court had granted the mandamus on imperfect information as to the facts, the mandamus could be challenged in this Court on further evidence, but the decision of the Divisional Court as to the legal meaning and effect of the Act of 1796 is binding, and a defence based on a different construction cannot be set up on the return to the mandamus. The damages recoverable by the plaintiff are not limited to the expenses to which he has been put by the false return. The Act 9 Anne, c. 20, speaks of both damages and costs being recoverable. *Bowles* v. *Neale* (6) and *Faulkner* v. *Elger* (7) are instances where the actual damage suffered was recovered. The granting of the rule nisi is the commencement of the proceedings for the purpose of the Public Authorities Protection Act.

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(1) (1835) 3 Ad. & E. 544.
(2) (1819) 3 B. & Ald. 220.
(3) (1832) 3 B. & Ad. 255.
(4) (1847) 13 Q. B. 30, 41.
(5) (1845) 6 Q. B. 898.
(6) (1835) 7 C. & P. 262.
(7) (1825) 6 D. & R. 517.

Cur. adv. vult.

July 31. McCardie J. read the following judgment: These proceedings give rise to an unusual number of novel and intricate legal questions. No such litigation has taken place within the memory of living lawyers. The points arise upon the traverse of a return to a prerogative writ of mandamus. The full and able arguments of counsel have occupied several days. Difficult though the points are, I deem it better to give judgment at once, as the long vacation begins to-morrow. The history of the matter must first be stated. Then I must consider the questions of law which call for decision. Finally, I must deal concisely with the facts which require determination. It is difficult to appreciate the facts until the former matters have been dealt with. (The learned judge stated the facts as set out above, and continued:) The legal contentions so ably argued by Mr. Rawlinson and Mr. North for the defendants raise several singular points of law and involve (inter alia) an inquiry into the practice at the present day with respect to proceedings subsequent to the issue of the usual prerogative writ of mandamus. It will be convenient to postpone for the present the questions of fact whether the defendants have effectually drained their district and whether they have in fact complied with the requirements of the writ of mandamus. The record before me is based upon the provisions of No. 125 of the Crown Office Rules, 1906. It provides as follows: "When any return is made to the first writ of mandamus, the applicant may plead to the return within such time and in like manner as if the return were a statement of defence delivered in an action; and subject to these Rules this pleading and all subsequent proceedings, including pleadings, trial, judgment, and execution, shall proceed and may be had and taken as if in an action." The effect of this seems to be to abolish the former mode of pleading by demurrer or traverse to the return and to place all proceedings subsequent to the return on the same procedure footing as an action at law.

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v.
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Smeeth
and
Fen
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Commis-
sioners.

McCardie J.

See Short and Mellor, 2nd ed., p. 244. Crown Office Rules, No. 2, provides that whenever no other provision is made by the rules the present procedure and practice remain in force.

I now take in order the points raised by Mr. Rawlinson. It was first submitted by the defendants that they were entitled to argue that the writ of mandamus should not have been issued by the Divisional Court. Upon the whole I think that this submission is sound in law. In Tapping on Mandamus (1848), p. 432, it is stated that in an action for false return the Court allows the propriety of issuing the writ of mandamus to be questioned. The two cases cited in support of this statement are not indeed very satisfactory, for both *Rex* v. *Clarke* (1) and *Green* v. *Pope* (2) are somewhat ambiguous. But it seems to be reasonably clear from *Clarke* v. *Leicestershire and Northamptonshire Canal Co.* (3) that the defendants in such proceedings as the present may impeach not merely the form of the writ of mandamus but also the grounds upon which it was issued. See also the further cases cited in Halsbury's Laws of England, vol. 10, p. 121. It is worthy of note that the Court will apparently allow the validity of even a peremptory writ of mandamus to be challenged upon an application to attach. See Shortt on Information and Mandamus, p. 423. If then the defendants are entitled to inquire into the validity of the grant of the writ of mandamus by the Divisional Court on June 24, 1918, I am called upon to consider the point raised by Mr. Rawlinson—namely, that upon a proper construction of the Acts of 1796, 1849 and 1863 no writ of mandamus could properly be granted. This is a contention of wide-reaching importance. If sound, it may seriously affect the powers of the Court to enforce as against many local bodies the duties which prima facie rest upon them by the Acts of Parliament to which they owe their being. Concisely put, the defendants contend that the Acts which govern them are permissive rather than directory, and that the commissioners have a discretion as to the carrying out of those Acts of Parliament which, if exercised bona fide, cannot be super-

(1) (1801) 2 East, 75, 82.

(2) (1696) 1 Ld. Raym. 125.

(3) 6 Q. B. 898, 903.

vised, governed or directed. The validity of this contention must, I think, depend in every case upon the true construction of the enactment in question. If, for example, a jurisdiction be given to an inferior Court all that that Court can be called upon by the High Court to do, save in special circumstances, is to hear and determine the matters brought before it in a regular and proper manner. Hence a mandamus is granted, if jurisdiction has been declined by the inferior Court, to hear and determine only. If the inferior Court has a discretion as to the decision it may give, then if that discretion be exercised bona fide and not arbitrarily or illegally and without reference to extraneous considerations the Court will not control the exercise of that discretion. See the cases cited in Short and Mellor on Crown Office Practice, 2nd ed., pp. 200 and 201. But I conceive that Acts of Parliament which confer a judicial discretion upon a subordinate tribunal are fundamentally different from Acts of Parliament which place duties upon such bodies as canal companies, dock companies, land drainage corporations and the like. The object of the former enactments is to secure a hearing and determination. They could scarcely provide that a decision should be given contrary to the view of the tribunal. But the object of the latter class of enactments is wholly distinct. They aim at securing a benefit to the public or a particular section of the community by creating a body for the performance of certain public works and the discharge of the duties appropriate thereto. But even in the latter class it may be that the Act of Parliament has granted a power rather than imposed a duty, has conferred a discretion rather than an obligation. If a power or discretion only, as distinct from a duty, exists then the prerogative writ of mandamus will not be issued by the Court. See, for example, *Ex parte Bassett* (1); *Reg.* v. *Commissioners of Lunacy* (2); Tapping on Mandamus (1848), p. 12; Shortt on Information and Mandamus, pp. 328—330. Now, in considering the question as to whether the enactment creates a duty as distinct from a mere power or discretion it is essential, as I have said, to consider the provisions of the enactment and to weigh its

(1) (1857) 7 E. & B. 280.

(2) [1897] 1 Q. B. 630.

general scheme and its substantial object. The use of the word "may" as distinguished from the word "shall" is in no way conclusive. It is a mere point for consideration. See *Julius* v. *Bishop of Oxford.* (1) This point is cogently illustrated by the decisions set out in Maxwell on Statutes, 5th ed., p. 394, and the following pages. Upon turning to the chief Act here in question—namely, the Act of 1796—it is to be observed that the words in s. 1 are imperative. The relevant words are: "Be it enacted that the said tracts of common and waste lands called Marshland Smeeth and Marshland Fen shall be effectually drained." In my opinion this places on the defendants a clear duty and an imperative obligation. It is true that in s. 15 the words are that the defendants are "authorised and empowered" to carry out a large number of works. But these words do not, in my opinion, lessen the imperative force of the words in s. 1. The duty is imperative, but the particular method of fulfilling the duty is left to the commissioners. The obligation of effectual drainage is imposed, but the details of the manner of discharging that obligation are a matter for their own decision. They may choose one of several methods of performance. But the performance itself cannot be escaped by a mere claim of discretion as to method. If I had yielded to the argument of Mr. Rawlinson it would, I think, have followed that the defendants could, in the exercise of a purported discretion, omit entirely to drain a particular part of their district or to drain in a most limited manner only the farms of particular landowners. This, in my view, cannot be. The obligation is as to the whole and not a part only of the area. The drainage must be effectual, but the method of effectual drainage is left to the judgment of the defendants. This point is in my view clear when it is remembered that the defendants have a full power of imposing rates on all owners and that those rates must be equal. There is no power of differentiating rates as between one owner and another owner nor of exempting any particular owner from rates. See s. 22 of the Act of 1796. It becomes still clearer when I point out that by virtue of

(1) (1880) 5 App. Cas. 214.

s. 32 it is made a quasi-criminal offence for any person in the district to set up (save by the express permission of the defendants) any mill or like device whatsoever for draining water from any land in the district. The defendants are drainage monopolists for the area. This imposition of an imperative obligation is not unjust to the defendants. They are not required to do anything which is legally impossible or physically impossible. They are not required to take absurd or unreasonable steps. They are not bound to provide for events of a wholly extraordinary character. Lex non cogit ad impossibilia. But they are bound in my opinion to take all such steps as are required to provide for the drainage of the district in a reasonably effectual manner. That is my own opinion as to the statutory obligation upon the defendants. But I cannot omit to point out that the rule nisi herein was granted by the Lord Chief Justice, Avory and Shearman JJ. upon the view that a duty of effectual drainage as distinguished from a merely permissive power prima facie rested upon the defendants. The like view was taken by Avory, Shearman and Sankey JJ., when on June 24, 1918, they made the rule nisi absolute. I entertain no doubt whatever that the rules nisi and absolute would not have been granted if the defendants had been free from the actual obligation of effectual drainage. It would be my duty in any event to follow with loyalty the weight of judicial authority I have indicated. I desire to make two further observations on this branch of the case, first, that in my opinion the case of *Rex* v. *Ouse Bank Commissioners* (1) impairs rather than confirms the argument of Mr. Rawlinson. Secondly, that I am clearly of opinion that no alternative remedy existed to the plaintiff which could deprive him of his right to ask for a prerogative right of mandamus. Sect. 94 of the Act of 1796 clearly gives no such remedy for the matter complained of here.

Logical sequence suggests that the next question is one of fact—namely, whether the defendants have complied with the writ of mandamus. But it will be convenient to postpone this question till I have considered the further questions of law.

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(1) 3 Ad. & E. 544.

The plaintiffs claim damages against the defendants, as I have pointed out, for breach of duty. Mr. Rawlinson contended, as a preliminary point of law, that no such damages can be claimed in the present proceedings. This contention gives rise to curiously novel points. If it be sound the plaintiff's claim to damages is wholly swept from my consideration.

Now, in order to deal with this point it is necessary to consider the history of the law on the matter. At common law the return to a mandamus was not traversable because upon it being filed it became a record of the Court and the prosecutor was not allowed to aver against the truth of it. For although the return was false in fact, the Court would not try the truth of the return upon affidavits but assumed it to be true, and declined to proceed further on the mandamus. The prosecutor therefore, if that was the case, was compelled to show by extraneous proceedings that the return was false, which was done by bringing an action on the case for a false return, and if it was found to be false the prosecutor not only recovered damages equivalent to the injury sustained but also, if the action was taken in the King's Bench, obtained a peremptory mandamus commanding the defendant to do his duty. See Tapping on Mandamus, pp. 6, 383, 425, and following pages. This need for extraneous proceedings was deemed oppressive, and hence Parliament enacted by 9 Anne, c. 20, that a person presenting a writ of mandamus might plead to and traverse all or any of the material facts contained within the return to which the person making such return could reply, take issue or demur, and such further proceedings should be had therein as might have been had if the persons suing the writ brought their action on the case for a false return. The statute further provided that in such proceedings the prosecutor could recover damages and costs and also a prerogative right of mandamus. This useful statute however only applied to mandamus proceedings with respect to the admission or restoration to certain municipal offices. Hence Parliament passed another Act, 1 Will. 4, c. 21. which in substance provided that the provisions of 9 Anne, c. 20, relating to the returns to writs of mandamus and the proceedings on such returns and to the recovery of damages and costs should be extended and made applicable to all other writs of mandamus and the proceedings thereon. The result appears to be that the prosecutor could, in substance, conjoin the benefits of an action for false return with his mandamus proceedings. These two statutes remained in force for many years. A wide and beneficent practice sprang up beneath their permissive enactments. They were repealed in 1883 but the repeal did not destroy the created practice. It remained as a part of the body of King's Bench law and procedure. See *Reg.* v. *Pirehill North Justices.* (1) This is the explanation of No. 125 of the present Crown Office Rules already set out in the judgment. See Short and Mellor on Crown Office Practice, 2nd ed., p. 127. The result is that, in my view, a prosecutor is fully entitled at the present day to claim damages in such proceedings as those before me, in addition to a prerogative writ of mandamus. If this be so then a further question arises—namely, whether damages can be claimed only where an action could, apart from the statutes, have been brought on the ground of a breach of statutory duty causing particular damage, or whether the statutes in question gave a wholly novel claim to damages independent of that ground. The answer to this question is given by *Reg.* v. *Fall.* (2) There it was held that under the conjoint effect of 9 Anne and of 1 Will. 4 damages could be obtained by virtue of the latter statute upon the traverse of a false return to a mandamus, even though no action would have lain by way of action on the case for false return by reason of inability to prove actual pecuniary damage. But apparently the measure of damages under the statute of 9 Anne, c. 20 and 1 Will. 4 is to be assessed on the same principles as those in an action for a false return. See Tapping on Mandamus, p. 7. This leads to an inquiry as to what those principles were. The text-books are vague. See, for example, Shortt on Mandamus, p. 418. Nor is there any case in which a direct decision appears. But upon principle it would seem that the so called " action for a false return " was a good deal more than a mere litigation to recover compensation from a defendant

(1) 14 Q. B. D. 13.

(2) 1 Q. B. 636, 646, 647.

for having placed an incorrect record upon the files of the Court. In truth and fact it was an action for the recovery of damages actually sustained through the failure by the defendants to discharge a statutory or common law obligation, the obligation having been established by the judicial grant of a mandamus and the failure being proved in the action for a false return. Thus, if a mandamus had been granted for the appointment of the prosecutor to an office of profit, and if he then succeeded in his traverse to the return to the writ he would apparently get damages based on the loss of the emoluments of the office as from the date when he ought to have been duly appointed. See *Bowles* v. *Neale* (1), where 25*l.* damages were given; *Faulkner* v. *Elger* (2), where 200*l.* damages were given. I accede to the forcible arguments of Mr. Ryde upon this point. It therefore follows, I think, that, if the facts so demand, and unless subject to any Statutes of Limitation, the plaintiff is entitled to recover substantial damages in these proceedings. I ought to add, however, that in my opinion a breach of duty by the defendants under the Acts 1796, 1849 and 1863 would give rise to an ordinary action for damages by the plaintiff if he suffered actual damage thereby. The cases on the point are not quite satisfactory. *Couch* v. *Steel* (3) has often been criticised, and *Atkinson* v. *Newcastle and Gateshead Waterworks Co.* (4), and *Saunders* v. *Holborn District Board of Works* (5) may hereafter be considered by the House of Lords. The decision must turn upon the scheme and wording of each particular statute. It may be that the statute indicates with reasonable clearness that there shall be no civil remedy at all for a person injured by the breach of the statute. It may be, on the other hand, that the statute provides a particular method, otherwise than by action, of claiming damages for breach of the statutory duty. But the general rule has, I think, been well stated by Vaughan Williams L.J. in *Groves* v. *Lord Wimborne* (6), where he said: "It cannot be doubted that, where a statute provides for the performance by certain persons

(1) 7 C. & P. 262.
(2) 6 D. & R. 517.
(3) (1854) 3 E. & B. 402.
(4) (1877) 2 Ex. D. 441.
(5) [1895] 1 Q. B. 64.
(6) [1898] 2 Q. B. 402, 415.

of a particular duty, and some one belonging to a class of persons for whose benefit and protection the statute imposes the duty is injured by failure to perform it, prima facie, and, if there be nothing to the contrary, an action by the person so injured will lie against the person who has so failed to perform the duty." In my opinion that passage from *Groves* v. *Wimborne* (1) covers the present case, and none the less so because the plaintiff happens, by reason of his ownership of Crown Farm, to be technically a commissioner himself.

If then the plaintiff can upon appropriate facts claim damages in these proceedings the further question arises as to the period over which the damages can be claimed. I conceive (in spite of *Ward* v. *Lowndes* (2)) that prima facie a plaintiff ought not in mandamus proceedings to get a longer period of damages than he would get in an ordinary common law action. See Darby and Bosanquet's Statutes of Limitations, 2nd ed., pp. 13, 14 and 541. I should be inclined here to apply by analogy the ordinary Statutes of Limitation just as they were applied, in substance, by the Courts of equity before the fusion of the common law and equity systems. See Darby and Bosanquet, pp. 234 et seq. I cannot myself see why a man should be enabled by mandamus proceedings to escape from the operation of the Statutes of Limitation. In the present case, however, Mr. Rawlinson relies also upon the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61). That Act provides (inter alia) that any action, prosecution or other proceeding against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority shall not lie or be instituted unless it is commenced within six months after the act, neglect or default complained of, or, in case of a continuance of injury or damage, within six months after the ceasing thereof.

Now, it was apparently the view of the Court in *Rex* v. *Port of London Authority* (3), that the words "action, prose-

(1) [1898] 2 Q. B. 402, 415.

(2) (1859) 1 E. & E. 940.

(3) [1919] 1 K. B. 176.

cution or other proceeding" do not apply to the prerogative writ of mandamus. But it must be remembered that the present proceedings are an amalgamation of mandamus process with an action on the case. Hence I do not think that *Rex* v. *Port of London Authority* (1) will operate to prevent the application here of the Public Authorities Protection Act, 1893. I hold that that Act is applicable to a claim for damages. This being so further questions arise. One is this: What is the commencement of the proceedings for the purpose of applying the Act of 1893 to the claim for damages? Upon the whole I think that the true date to fix is the motion for the rule nisi. This is the juristic basis of the litigation in the course of which the claim for damages arises. Just as in the case of the Summary Jurisdiction Acts it has been held that the laying of the information is the commencement of the prosecution so here I hold that the motion for the rule marks the initiation of all the proceedings before me. If this be so then the plaintiff cannot in any event recover damages for the period earlier than six months from May 23, 1917, unless he can prove that there was a continuance of injury and damage. This second point I will briefly deal with hereafter.

I now deal most concisely with the facts. To a very large extent they are undisputed. [The learned judge then dealt with the evidence, and continued:] Upon a consideration of the whole circumstances I am clearly of opinion that the defendants have shown no excuse whatever for their failure to comply with the recommendations contained in Mr. Grantham's report. I accept without hesitation the testimony given by and on behalf of the plaintiff, and I am satisfied that the defendants have made no serious effort to comply with the mandamus. It follows that in my opinion a peremptory writ of mandamus ought to issue.

I am also satisfied that the plaintiff has suffered substantial damages through the default of the defendants. What damages shall I award? The plaintiff's main object in these proceedings is a peremptory writ of mandamus. Hence he has

(1) [1919] 1 K. B. 176.

agreed to accept a comparatively small sum as damages. The amount thereof has been arranged by counsel for the plaintiff and defendants upon varying hypotheses as to the effect of the Public Authorities Protection Act, 1893. If the plaintiff can only recover for the period of six months prior to June, 1917, then the amount is agreed at 140*l*. But if his damages are not limited to that period the amount agreed is 200*l*. The question therefore is whether or not Mr. Ryde and Mr. Scott are right in arguing that there was here a "continuance of injury or damage." These words are curiously vague. The net result of the authorities appears to be that in order to come within these words a plaintiff must prove a continuing breach of duty together with a continuing damage. This appears to be the effect of the old cases of *Lloyd* v. *Wigney* (1) and *Whitehouse* v. *Fellowes* (2) as interpreted in *Carey* v. *Mayor of Bermondsey* (3) and by Buckley J. in *Earl of Harrington* v. *Derby Corporation* (4). The same view is supported, I think, by *Attorney-General* v. *Lewes Corporation* (5) and *Hart* v. *St. Marylebone Borough Council.* (6)

In the present case I am of opinion that the plaintiff has proved a continuous breach of duty by the defendants for many years and a continuous damage resulting from that breach. The drains, which the defendants should have kept clear and in good order and at a proper level, were continuously obstructed and in bad order and at wrong levels, and the contiguous works of the defendants leading to the pumping station have been continuously defective. As a result of these defaults the plaintiff's land has, in my opinion, been continuously and substantially damaged. I therefore assess the damages at the agreed sum of 200*l*.

I desire to add a few further observations. First, I am satisfied that the plaintiff's own internal drains and works were kept in reasonably good order ; secondly, that no part of the plaintiff's damages has been caused by his own default ; thirdly, that the time has now arrived when it is imperative that the defendants should take steps for providing a pumping station of increased capacity, in addition to a prompt and full completion of the matters mentioned in Mr. Grantham's report.

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(1) (1830) 6 Bing. 489.
(2) (1861) 10 C. B. (N. S.) 765.
(3) (1903) 67 J. P. 111.
(4) [1905] 1 Ch. 205.
(5) [1911] 2 Ch. 495.
(6) (1912) 76 J. P. 257.

The result of the whole matter, therefore, is that I direct that a peremptory writ of mandamus be issued forthwith, and I also direct that judgment be entered for the plaintiff for the sum of 200*l.* damages with solicitor and client costs as agreed.

Judgment for plaintiff.

Solicitors for plaintiff: *Rider, Heaton, Meredith & Mills, for F. J. Wise, March.*

Solicitors for defendants: *Wing & Eade, for G. M. Jackson, Wisbech.*

F. O. R.

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July 25.

SCOTT, APPELLANT v. THE NORTHUMBERLAND AND DURHAM MINERS PERMANENT RELIEF FUND FRIENDLY AND APPROVED SOCIETY, RESPONDENTS.

Insurance (National Health)—Maternity Benefit—Married Woman confined of illegitimate Child—Husband insured Member of approved Society—Non-cohabitation with Husband—Right of Wife to claim Benefit—National Insurance Act, 1911 (1 *&* 2 *Geo.* 5, *c.* 55), *ss.* 8, 18, 67—*National Insurance Act*, 1913 (3 *&* 4 *Geo.* 5, *c.* 37), *s.* 14.

Among the benefits conferred by the National Insurance Act, 1911, upon insured persons is a benefit called "maternity benefit," which is defined in s. 8, sub-s. 1 (*e*), as "payment in the case of the confinement of the wife or, where the child is a posthumous child, of the widow of an insured person . . . . of a sum of thirty shillings."

By s. 14, sub-s. 1, of the National Insurance Act, 1913, "maternity benefit shall in every case be the mother's benefit," and "the benefit shall be administered in the interests of the mother and child in cash or otherwise by the approved society of which the husband is a member":—

Held, first (Darling J. dissenting), that maternity benefit is payable in the case of the confinement of a married woman by reason of the fact that her husband is an insured person irrespective of the paternity of the child.

Secondly, by the whole Court, that a claim made by a married woman against her husband's approved society for maternity benefit is a claim made through an insured person within s. 67 of the Act of 1911, and that therefore it is a claim in regard to which an appeal lies to the Insurance Commissioners under that section.

Special case stated by the Insurance Commissioners at the request of the respondents for the opinion of the Court under s. 19 of the Arbitration Act, 1889.

The respondents, hereinafter called "the society," were a society restricted to male persons, and were an approved society for the purposes of Part I. of the National Insurance Act, 1911. The appellant, Elizabeth Scott, was the wife of one David Scott, who was an insured person within the meaning of the Act of 1911, and a member for the purposes of that Act of the society.

In September, 1915, David Scott, having joined the Army, proceeded to France on military service, and had not since that date cohabited with the appellant. On January 15, 1917, the appellant was confined of a child of which it was admitted that David Scott was not the father.

The appellant subsequently claimed maternity benefit from the society in respect of her confinement, but the society by decision of their general committee declined to pay on the ground that the child of which the appellant was confined was not the child of the said David Scott. David Scott had made no claim for the benefit, and was not in any way a party to the proceedings.

By s. 8, sub-s. 1 (*e*), of the Act of 1911, "maternity benefit" is defined as "payment in the case of the confinement of the wife or, where the child is a posthumous child, of the widow of an insured person, or of any other woman who is an insured person, of a sum of thirty shillings." By s. 18, sub-s. 1, of the Act of 1911, as amended by s. 14, sub-s. 1, of the National Insurance Act, 1913, "the benefit shall be administered in the interests of the mother and child in cash or otherwise by the approved society of which the husband is a member." By s. 14, sub-s. 1, of the Act of 1913, "maternity benefit shall in every case be the mother's benefit, but, where the benefit is payable in respect of the husband's insurance, the wife's receipt, or his receipt, if authorised by her, on her behalf, shall be a sufficient discharge to the society or committee, and, where the benefit is paid to the husband, he shall pay it to the wife."

The appellant appealed in accordance with rule 28 of the rules of the society from the decision of the general committee to the appeal committee of the society, who decided the appeal against the appellant.

The society wrote to the appellant on September 24, 1917, stating that her claim for maternity benefit had been considered by the appeal committee, who had decided that under the circumstances maternity benefit could not be paid to her, and also stating that if she was dissatisfied with that decision it was open to her to take her case to the Commissioners.

Rule 28 of the rules of the society was as follows: "If any dispute in connection with the business of the society under the National Insurance Act arise between an insured member or a person who has ceased to be an insured member or a person claiming through such member or person or under the rules of the society it shall be referred in the first instance to the general committee, and an appeal from their decision shall be to an appeal committee, and the application must be made within six calendar months from the date of the decision complained of by the complainant. The appeal committee shall consist of five members approved through the society who shall be elected by slip vote in January of each year and be eligible for re-election."

The appellant then appealed to the Insurance Commissioners against the decision of the appeal committee of the society in accordance with the procedure prescribed by s. 67 of the Act of 1911 and the National Health Insurance (Approved Societies) Consolidated Regulations, 1916.

The society by their reply to the appellant's notice of appeal defended their refusal to pay to the appellant the maternity benefit in question on the following grounds:—(1.) That on the true construction of the provisions of the National Insurance Acts, maternity benefit as defined by s. 8, sub-s. 1 (*e*), of the Act of 1911 is not payable in any case out of the husband's insurance in respect of any child other than a child by such husband. (2.) That maternity benefit is not payable in respect of any child other than a child by such husband where the husband and wife are not living together. (3.) That the claim was contrary to public policy. (4.) That the appellant was not a party to any dispute with the society which would entitle her to appeal to the Commissioners.

The Commissioners stated that they had already held in the exercise of their appellate jurisdiction under s. 67 of the Act of 1911 in a case similar to the present, and were prepared to hold in the present case (subject to the opinion of the Court) that, where the wife of an insured person is confined, maternity benefit is payable by the approved society of which her husband is a member irrespective of questions as to the paternity of the child. In their view the language of para. (*e* of sub-s. 1 of s. 8 of the Act of 1911 is so precise as to exclude considerations of public policy in such a case apart from the fact that under that paragraph the payment of maternity benefit in the case of the confinement of an unmarried woman who is an insured person is clearly recognized. It appeared also to them that since the enactment of sub-s. 1 of s. 14 of the amending Act of 1913 the maternity benefit payable in the case of the confinement of the wife of an insured person is the property of the woman herself and not of her husband (though her title thereto arises from the fact that her husband is an insured person) inasmuch as by that sub-section—(*a*) the benefit is to be the mother's benefit, (*b*) the wife's receipt is a sufficient discharge to the society unless the husband, being authorized by her, signs the receipt on her behalf, and (*c*) the husband, if the benefit is paid to him as his wife's authorized agent, is under a statutory obligation to pay it over to her. It appeared therefore to the Commissioners that the effect of the amending Act is to disinterest a husband in the maternity benefit payable in respect of his wife's confinement, and that this afforded a further ground for the interpretation which (subject to the opinion of the Court) they conceived themselves bound to place upon the Acts. They were of opinion also

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that an interpretation which would justify an approved society in instituting inquiries into the paternity of a child born while an insured person was cohabiting with his wife could not lightly be adopted.

With regard to the contention of the society that the appellant was not a party to any dispute which would entitle her to appeal to the Commissioners, the Commissioners were prepared to hold (subject to the opinion of the Court) that the appellant was a person claiming through an insured person within the meaning of s. 67 of the Act of 1911 and (so far as this might be material) rule 28 of the society's rules, and that in any event the society were precluded or estopped from raising any such question at the present stage in view of the fact that the appellant's claim had already been entertained and determined by the general committee and the appeal committee of the society without any objection to their jurisdiction being raised.

The opinion of the Court was desired upon the following questions:—

(1.) Whether on the true construction of the provisions of the principal Act and of the amending Act maternity benefit in the case of the confinement of a married woman is payable by reason of the fact that her husband is an insured person irrespective of the paternity of the child.

(2.) Whether the claim for maternity benefit by a married woman against her husband's approved society is one in regard to which an appeal lies to the Commissioners under s. 67 of the principal Act.

(3.) Whether the society were in any event precluded or estopped in the circumstances of the present case from contending that such an appeal did not lie.

The decision of the Insurance Commissioners in the case of *Mrs. Cecilia May Lowe* v. *Shropshire Provident Society*, a similar case to the present one, was annexed to the special case. In the course of their decision in that case the Commissioners said: "It is scarcely necessary to point out that if the question of the paternity of the child is a relevant consideration in the present case it cannot be excluded in cases where the husband and wife have been cohabiting throughout the period before the child's birth, and in the Commissioners' opinion an interpretation of the statute which admitted such a possibility cannot lightly be adopted."

Comyns Carr for the respondent society. A married woman who has left her husband and had a child by another man cannot claim maternity benefit from her husband's insurance society under the National Insurance Acts in respect of her confinement. It is true that s. 8, sub-s. 1 (*e*), of the National Insurance Act of 1911 provides for payment of maternity benefit in the case of the confinement of an unmarried woman of an illegitimate child, but that is only when she is herself an insured person. In the present case the appellant was not herself an insured person. Sect. 8, sub-s. 1, of the Act of 1911 commences with the statement that "subject to the provisions of this Act, the benefits conferred by this Part of this Act upon insured persons are," the various benefits there enumerated, including maternity benefit, which is defined in para. (*e*) as "payment in the case of the confinement of the wife or, where the child is a posthumous child, of the widow of an insured person," of a sum of thirty shillings. Maternity benefit was therefore intended when that Act was passed to be a benefit conferred upon the insured person in respect of his child by his wife. It is clear from s. 1, sub-s. 1, of the Act of 1911 that the person who is entitled to the benefits conferred by the Act is the insured person. It is no benefit to him that a sum of money should be paid out of his insurance in respect of his wife's illegitimate child. The words "payment in the case of the confinement of the wife" in s. 8, sub-s. 1 (*e*), might perhaps, if they were considered by themselves, be held to be ambiguous and to cover such a case as the present. But the sub-section ought to be regarded as a whole, and when that is done it is clear that the words mean, and ought to be read as if they were, "payment in the case of the confinement of the wife of an insured person of a child which is the child of the insured person." That view is supported by the succeeding words of the section, "or, where the child is a posthumous child, of the widow of an insured person." A posthumous child must mean a child born after the death of its father who was the husband of the widow and the insured person. Sect. 10, sub-s. 4 (*b*), makes this clear because it expressly refers to "maternity benefit payable in respect of the posthumous child of an insured person." The Legislature cannot have intended that a different meaning should be given to the term "confinement of the wife" than to the term "confinement of the widow" in the case of a posthumous child. In s. 8, sub-s. 8, of the Act of 1911 it is provided that an insured person shall not be entitled to maternity benefit until twenty-six weeks in the case of a compulsory contributor, or fifty-two weeks in the case of a voluntary contributor, have elapsed since his entry into insurance. By s. 11 of the National Health Insurance Act, 1918 (7 & 8 Geo. 5, c. 62), a period of forty-two weeks has been substituted for those periods in the case of both voluntary and compulsory contributors. The object of the section was to prevent a person with foreknowledge of the event providing by insurance for that event, but it would be useless to insert a provision of that kind unless the only child in respect of which the benefit was to be paid was the child of the insured person. The position before the amending Act of 1913 was passed was that the husband, who was the insured person, was the person entitled to the benefit; he alone could claim it; it had to be paid to him and his receipt had to be taken by the insurance society as their discharge. He was, however, under an obligation to devote the benefit to the support of the wife and child. That provision was found, however, to be not sufficient, and the Amending Act of 1913 in effect provides by s. 14 that the maternity benefit shall be paid to the wife for her own benefit; it alters the manner in which it shall be paid and the person to whom it shall be paid, but it does not alter the conditions on which the benefit becomes payable, nor does it make the benefit payable in circumstances in which it would not have been payable previously. It merely provides that "maternity benefit shall in every case be the mother's benefit."

[EARL OF READING C.J. Suppose a woman is confined of a child which admittedly is not the child of her husband, the insured person, but the husband nevertheless desires that she should have the maternity benefit. Why should she not have it? He has paid the money and the maternity benefit is payable by virtue of his insurance.]

It may be that the correct view is that the husband is still the person entitled to claim the benefit, and that the benefit cannot be paid except on his claim, although it must be paid to the wife. Whichever way the statute is interpreted it will involve hardship to someone. The husband of the appellant in this case cannot be compelled to support his wife's illegitimate child, and therefore the payment of this maternity benefit is no benefit to him because it does not protect him against any liability, whereas every other benefit conferred by the Act does protect him against a legal liability.

Under s. 67, sub-s. 1, of the Act of 1911, the Insurance Commissioners have to decide on appeal disputes between an approved society and an insured person who is a member of such society or any person claiming through him. The appellant is not entitled to appeal in this case, as she is not an insured person who is a member of the society, nor is she a person claiming through an insured person who is a member of the society. She does not claim through her husband; he is not a party to the claim; her claim is made adversely to him because she claims to deplete the funds which otherwise would be available to pay benefits to him. A person claiming through an insured person is a person who derives a legal title from the person through whom the claim is made, such as his legal personal representative. The respondent society are not estopped from raising this question now because the National Insurance Acts did not apply at all until the question came before the Insurance Commissioners for decision. The proceedings before the general and appeal committees of the society were under the society's rules, and the society were under their rules entitled to hear the appellant's claim.

The appellant, Mrs. Scott, did not appear.

Sir Gordon Hewart A.-G. (*Branson* with him) for the Minister of Health as amicus curiæ. Among the benefits which are payable under s. 8 of the National Insurance Act of 1911 is a payment " in the case of the confinement of the wife." The confinement of the wife is a physical fact, and when that takes place this payment is to be made. No doubt it is not to the benefit of an insured person that his wife should bear a bastard child, but if she does have a bastard child it may be to his benefit that both she and the child should be properly looked after. Any doubt with regard to the matter is removed by s. 14 of the amending Act of 1913, which provides that " maternity benefit shall in every case be the mother's benefit." It cannot be suggested that it is contra bonos mores for this woman to take the benefit because nothing that is an Act of Parliament can be contra bonos mores. Any other construction than this one would lead to harsh and undesirable results. It would be intolerable if the insurance society had in every case to inquire into the paternity of a child. It would be contrary to the policy and also to the clear terms of the Act to discriminate in that way. If the wife of an insured person is confined maternity benefit is payable without regard to any question as to the paternity of the child. An insured person who is married is not prejudiced in any way by the payment of maternity benefit to his wife since an unmarried man pays exactly the same contributions under the Act of 1911 as that which is paid by a married man, and further what is paid by way of maternity benefit does not take away from the insured person's other benefits ; it was never intended that he should receive the maternity benefit; he receives all the benefits to which he is entitled. Neither does it add to his payments, the contributions which he makes do not provide the whole of the benefit, because the State also makes a contribution. The claim which the appellant made to the Commissioners is a claim through an insured person within the meaning of s. 67 of the Act of 1911. It is owing to the fact that she was the wife of an insured person that she becomes entitled to maternity benefit. The society is precluded from raising that question now because the appellant's case has been heard and determined by the general committee and by the appeal committee of the society and no objection to their jurisdiction was raised. Further the society actually invited her to appeal to the Commissioners.

Comyns Carr in reply. A father is not liable to maintain his wife's bastard child if he can establish that he had no opportunity of access to his wife, and therefore the maintenance of the child is no benefit to him. An insured person is prejudiced by the payment of maternity benefit; if he is a deposit contributor he is only entitled to benefits to the extent to which there is money to his credit in the fund, and therefore loss occasioned by the payment of maternity falls directly upon him, whereas if he is a member of an approved society he is a loser in common with all the other members of the society because there is a danger of his benefits being lessened by the depletion of the funds of the society.

BRAY J. As the members of the Court are not agreed it falls to me to deliver the first judgment. The first rule in law with regard to the construction of statutes is to ascertain the ordinary and grammatical meaning of the words used in the statute. The statute in question in the present case is the National Insurance Act, 1911, and I do not propose to deal with any other Act than that one. Sect. 8, sub-s. 1, of that Act provides as follows: "Subject to the provisions of this Act, the benefits conferred by this Part of this Act upon insured persons are . . . . (*e*) payment in the case of the confinement of the wife." Now, if one stops there, I do not see that there is any ambiguity in those words. The section goes on, "or, where the child is a posthumous child, of the widow of an insured person." That may raise an arguable question. But even if one assumes that the words mean where the child is legitimately a posthumous child, still that comes in the second paragraph of the clause, and there is no limitation in the first paragraph of the clause. Therefore when one looks at the words of the statute it seems to me that they are quite plain. What is the duty of the Court in such a case? It was laid down long ago by Lord Wensleydale in *Grey* v. *Pearson* (1) that "in construing wills and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no farther." Then again it was laid down by Lord Campbell C.J. in *Reg.* v. *Skeen* (1) that "where, by the use of clear and unequivocal language, capable only of one construction, anything is enacted by the Legislature we must enforce it, although, in our own opinion, it may be absurd or mischievous." That dictum was approved and followed by Lord Esher in *Reg.* v. *Judge of City of London Court.* (2)

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(1) (1857) 6 H. L. C. 61, 106.

Now are there any reasons why we should not adopt the ordinary and grammatical sense of the words used in this statute? In my opinion there is no real reason why we should not give them their ordinary and grammatical sense. It is not an unreasonable thing, and it may in certain cases, as has been pointed out, be of great benefit to the husband that his wife should receive the maternity benefit in respect of her confinement of a child of which he is not the father. It is not altogether uncommon even after a wife has been unfaithful during the war and has had a child that the husband should take her back to live with him, in which case if the section is to be construed as has been suggested that it should be she would be disentitled from having this benefit. Why should she be disentitled? I will give another case, although it is probably a very unusual one. Supposing the unfortunate woman has been raped and as a result is confined of a child, it would be very hard that she should lose the benefit of this provision. It is said that it would be contrary to good morals that a woman should be encouraged by having this benefit, but that seems to me a very small matter indeed. The statute has provided for maternity benefit in the case of an unmarried woman. I cannot help thinking that the possibility of there being a child not begotten by the husband would occur to those who drafted the statute and to those who passed it.

(1) (1859) 28 L. J. (M. C.) 91, 94.

(2) [1892] 1 Q. B. 273, 290.

One would have expected that they would have provided for such a case if it had been intended in that case that the wife should not have the maternity benefit, but they have not so provided. One matter was referred to by the Insurance Commissioners in their decision in the former case, which seems to me by no means unimportant. They say: "It is scarcely necessary to point out that if the question of the paternity of the child is a relevant consideration in the present case it cannot be excluded in cases where the husband and wife have been cohabiting throughout the period before the child's birth, and in the Commissioners' opinion an interpretation of the statute which admitted such a possibility cannot lightly be adopted." For these considerations it seems to me that the words of the statute are clear and unambiguous, and that there is nothing in them to lead us to suppose that the Legislature contemplated that they would be read in any other than their obvious meaning. There is nothing absurd or unusual in them. In these circumstances I think we ought in this case to adopt the maxim of interpretation I have already referred to, which to my mind is clearly in favour of the appellant.

DARLING J. In my view the decision of this Court should be in favour of the respondent society. A man had become an insured person by making a contribution to an approved society, and in consequence became entitled under the National Insurance Act, 1911, to certain benefits for himself and also to a benefit if his wife was confined, called maternity benefit. It is true that by s. 4 of the amending Act of 1913 it is enacted that "maternity benefit shall in every case be the mother's benefit," but that is only I think to ensure that the man does not make away with the benefit when it is paid, and that it is applied to the advantage of the woman who has been confined and of the child which is the result of the confinement. The question before us arises in this way. The insured person here who had insured in an approved society had proceeded abroad on military service, and he had been away so long from his wife that it was impossible that the child of which she was confined in his absence could have been begotten by him. The child was manifestly the child of the woman by another man, and it is so found in the case. The woman claimed maternity benefit from her husband's society in respect of her confinement. It is said that the absent soldier's contributions to his approved society and the contributions of the other members of the society, all in proportion, should be applied to provide maternity benefit for this woman, who was not herself insured, and her child by a man who also was not insured in the society, that is to say, that this soldier's money should be used to provide comforts for his adulterous wife and for her bastard child. It is said that that result follows by reason of s. 8 of the National Insurance Act, 1911. According to that section maternity benefit is one of the benefits conferred by the Act upon insured persons. The only insured person, notwithstanding that s. 14 of the Act of 1913 says that "maternity benefit shall in every case be the mother's benefit," is the man who is a member of the approved society—in this case the absent soldier—and the benefit according to s. 8 of the Act of 1911 is conferred upon him. But if thirty shillings is paid in this case to this woman, what benefit is conferred upon the man ? It would go to keep a woman whom he could not be compelled to keep owing to her misconduct if she became chargeable to the parish. It would also go towards the support of a child whom he could not be obliged to support because it is a bastard child whom another man could be obliged to support if affiliation proceedings were taken because it is his child. I cannot see that this section obliges us to hold that the respondent society should pay maternity benefit to this woman. The section says: "Subject to the provisions of this Act, the benefits conferred by this Part of this Act upon insured persons are . . . . payment in the case of the confinement of the wife." I take that to mean the wife of the insured person; the section says "the wife," not "a wife" or "anyone's wife." The section continues "or, where the child is a posthumous child, of the widow of an insured person." Now what is the point of saying that if the child is born after the death of the insured person the woman shall still receive and the child shall also get the benefit of the thirty shillings ? Surely it is because the Act is dealing with the insured person upon whom the benefit is said to be conferred and with the child of the insured person, even though it be a posthumous child, so that the contributions of the insured person will have ceased before the child's birth. As I read the Act, the Legislature has said that if a man has been a prudent man and has paid money to an approved society for the benefit of himself while he lived it shall enure to the benefit of his widow when he dies, and to the benefit of his posthumous child. That seems to me to be reasonable and proper. But when it comes to saying, as it is said here, that the money which has been contributed by the economies of this man and his fellow members in the approved society should be applied for the benefit of an adulterous woman and of her bastard child by her paramour, I can myself see nothing in the Act of Parliament which obliges me so to hold. It seems to me that the whole scheme of the section presupposes the case of a child born in wedlock, and one not subject to proceedings to show that it really has no title to consider itself a child of the marriage. No doubt difficult and hard cases can be put whatever construction is placed on the statute, but it seems to me that if the language of the statute is looked at it does not give rise to any difficulty. It is true that the language of the statute may not have made quite certain what would happen in the case put by my brother Bray, though I do not think that such a case would give me much difficulty. In my opinion the only meaning that can be properly put upon the words of the statute is that they are dealing only with the insured person, with his wife and with the legitimate issue of the marriage, and that the Legislature were not contemplating anyone else. If the argument put forward in support of the appellant's claim is correct, it follows that if the man was a deposit contributor, the actual money which he had paid in for his own benefit would be taken and applied to the benefit of his adulterous wife and her paramour and their illegitimate offspring. If the man was a member of an approved society, as in the present case, the maternity benefit would not be entirely paid out of his contributions but would be paid partly

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out of his contributions and partly out of the contributions of the other members of the society and of the State. So we should have the hardship pointed out long ago in the line sic vos non vobis mellificatis apes. I thought that these statutes were passed in order to make people economise and provide for themselves, and not to provide for drones and other eaters-up of the economies of respectable persons.

EARL OF READING C.J. This case undoubtedly raises difficulties. It does not seem to me so clear as it does to either of my brothers who have come to opposite conclusions, but upon the whole the view of my brother Bray is the one that commends itself to me though not entirely. Whilst saying that I must also add that much of the reasoning of my brother Darling also commends itself to me, but I am unable to come to the same conclusion as he has done. I will state quite briefly my views. It must be remembered that the National Insurance Act, 1911, provided compulsorily for the insurance of all workers who came within the Act. It is not a case of their providing an insurance by means of the payment of premiums under a voluntary contract; if a person come within the Act he is obliged by the State to pay a certain portion of the premium payable in order to ensure benefits under the Act. He pays a part, the State supplements it, and the employer pays the balance; the object being to provide for certain payments to the insured person in the case of sickness. The statute was passed for the public good in order as far as possible to promote the better health and the better treatment during sickness of persons who come within the Act. The Act is entitled: "An Act to provide for insurance against loss of health and for the prevention and cure of sickness and for insurance against unemployment, and for purposes incidental thereto." It was part of the scheme of the Act that a maternity benefit should be provided under the Act. That maternity benefit by the Act of 1911 as amended by the Act of 1913 was meant to enure for the benefit of the woman and the child of which she was confined; it was never intended as a benefit to the husband who was the insured person except in the sense that it was of undoubted advantage to him that his wife should receive money which would enable her to be properly treated, and that his child should be properly cared for.

Bearing these considerations in mind I apply myself to the facts of this case. David Scott proceeded to France on military service in September, 1915, and since that date had not cohabited with his wife. On January 15, 1917, she was confined of a child, and admittedly on the facts David Scott was not the father. David Scott was an insured person within the meaning of the Act. The wife claimed maternity benefit from his approved society in respect of her confinement, and the question that arises before us is whether she is entitled to that maternity benefit. Sect. 8 of the Act of 1911 says: "Subject to the provisions of this Act, the benefits conferred by this Part of this Act upon insured persons are . . . . payment in the case of the confinement of the wife." I think that in using those words the Legislature were primarily referring to a child born of the marriage. I do not know (and it is idle to speculate) what would have happened from the introduction of some such words as Mr. Comyns Carr would have introduced for the purpose of making clear that the payment was only to be made in the case of the confinement of a wife of a child lawfully begotten of the marriage. The words however are not in the section, and the language of the statute properly construed is wide enough to cover the case of the confinement of the wife of an insured person without any limitation as to the paternity of the child. The question I have to put to myself is: Ought I by reason of the language used in the whole statute to introduce some qualifying or limiting words in s. 8, sub-s. 1 (*e*)? I have come to the conclusion that I ought not. Many cases have been suggested that give rise to all kinds of difficulties, and it may well be that the Legislature intentionally used this perfectly simple language in order to cover the vast majority of cases, and that if it contemplated a case like the present one it did not intend to make it an exception. It may be, and possibly that is the correct view, that the case with which we have now to deal was never in the Legislature's contemplation at all. But that does not help because we are then left to apply the general principle of law, which is that we must construe the words in the statute according to their grammatical and ordinary meaning, unless we come to the conclusion that such a construction would either be absurd or repugnant or inconsistent with the remaining provisions of the statute. I cannot think that the construction which I am placing upon it would lead to an absurdity, on the other hand I can see many difficulties and absurdities which might result from our taking another view. I quite agree that cases may be put on either side with equal success. During the course of the argument I put a question to Mr. Comyns Carr to which I cannot see the answer and which has had considerable weight with me. Maternity benefit arises out of the payments made by the insured person. It must not be forgotten that in the present case he is not a party to the proceedings; he has made no claim and has raised no objection; apparently he is indifferent what the decision of this Court may be. Now a husband whose wife has been confined of a child that is not his may nevertheless take her back and wish that she should receive the maternity benefit. Why should she not in such a case have the benefit? Her husband has paid for the benefit to which he is entitled, but if the argument that Mr. Comyns Carr put forward is correct there is, as far as I can see, no machinery and no provision under the Act by which she would get this money; in fact Mr. Comyns Carr, who has a very great knowledge of this Act, was unable to answer the question, and for the reason, as I think, that there is no answer to it. That assists me to come to a conclusion; it shows me that it could never have been intended by Parliament that such a state of things should arise. The husband who is an insured person cannot be deprived of this benefit because his wife may have sinned if he himself is wishful that she should get the benefit of it, and yet if we construe the Act as Mr. Comyns Carr asks us to do it is perfectly clear that the husband would not be entitled to the maternity benefit for his wife at all although in fact he has paid for it. It is well known that there are cases in which the husband takes his wife back notwithstanding that she has committed this serious fault. Why should she in such a case be deprived of the maternity benefit ? What is there in the statute which says that she should be deprived of the maternity benefit in such a case ? I have therefore come to the conclusion that I must give the words of s. 8 their proper grammatical meaning. That is in this case the only safe course ; it is dangerous to speculate on what was in the minds of the Legislature apart from the precise meaning of the language used. I am not sure that all the members of the Court would agree on what the Legislature meant to have done or should have done. What we have to deal with is the language used in the statute and to apply the ordinary principle of law to that language. It is true that there are very grave reasons why the contrary construction should be adopted in certain cases, but there are equally serious reasons why a contrary construction would lead to very great hardship. I therefore fall back on the ordinary and grammatical meaning of the language used in the statute, and of that there can be no doubt.

I conclude with the answers to the questions that are put in the case. The first question is, "Whether on the true construction of the principal Act and of the amending Act maternity benefit in the case of the confinement of a married woman is payable by reason of the fact that the husband is an insured person irrespective of the paternity of the child ?" The answer I make is Yes. The second question is, "Whether the claim for maternity benefit by a married woman against her husband's approved society is one in regard to which an appeal lies under s. 67 of the principal Act ?" I answer Yes. It is a claim that she makes through an insured person, who is her husband ; she derives her claim by reason of his insurance ; she has no claim to the maternity benefit except in consequence of his insurance ; therefore she is a person claiming through an insured person, and consequently under s. 67 of the Act she is a person who comes within it. Question 3 is, "Whether the society are in any event precluded or estopped in the circumstances of the present case from contending that such an appeal does not lie?" Again I answer, Yes. I think the society are by their action prevented from so contending. There have been two appeals already; there was an invitation given to make an appeal, and I think it would be wholly contrary to the ordinary principles of this Court to allow such an objection to prevail. The answer to the third question really becomes immaterial—although I have answered it because it has been put—when the second question is answered as I have stated.

Bray J. I ought to have stated that my answers to the questions put are the same as those given by the Lord Chief Justice.

Darling J. I might say with regard to questions two and three that I do not differ. I have intimated where I differ from the other members of the Court in my judgment.

Solicitors for respondent society: *Kingsley Wood & Co. for R. Sheriton Holmes, Newcastle-upon-Tyne.*

Solicitor for Minister of Health.

R. F. S.

COMMISSIONERS OF INLAND REVENUE *v.* MARINE STEAM TURBINE COMPANY, LIMITED.

1919
June 18.

Revenue—Express Profits Duty—Undertaking for working of Invention—Transfer of Undertaking—Consideration for Transfer—Payment of Royalties—Royalties received by Transferor—Profits of "business"—Finance (*No.* 2) *Act*, 1915 (5 *&* 6 *Geo.* 5, *c.* 89), *ss.* 38, 39.

A company, which had acquired under an agreement with the inventor and patentee of a turbine engine and a licence pursuant thereto the right to take over his invention and to manufacture and sell the engine, and had for a time exercised these rights, went into voluntary liquidation, and its liquidators entered into an agreement on its behalf with a new company by which they transferred all the old company's rights under the licence and all its other assets to the new company in consideration of a sum in cash, certain shares in the new company, and a royalty for a term of years on every machine sold by the new company, with collateral rights to receive from the new company periodical statements of all machines sold by it, and to inspect its operations and accounts. The liquidation was afterwards stayed by the Court, and thereupon the old company received the royalties and, after deducting certain sums payable by it to the inventor, distributed the balance among its shareholders:—

Held, that the old company in receiving the royalties was not receiving the profits of any "trade or business" carried on by it within the meaning of the Finance (No. 2) Act, 1915, Part III., relating to the excess profits duty, and therefore that it was not liable to be assessed to that duty in respect of the royalties.

Case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

At a meeting of the Commissioners held on April 26, 1918, for hearing appeals, the Marine Steam Turbine Co., Ld., hereinafter called the respondent company, appealed against an assessment to excess profits duty in the sum of 15,940*l.* 4*s.* for the accounting period of one year ended December 31, 1916, made upon them by the Commissioners of Inland Revenue, hereinafter called the appellants.

The case stated was substantially as follows:—

1. The respondent company was incorporated under the Companies Acts in 1894. In a prospectus of the company privately circulated it was explained that the company was being formed for the purpose of completing and testing the marine turbine engine invented and patented by Sir (then Mr.)

Charles Parsons, and for demonstrating the possibility of its application to ocean-going ships. The authorized capital of the company was 25,000*l.* in 500 shares of 50*l.* each, of which 480 shares were issued.

2. The respondent company by agreement dated January 31, 1894, agreed to take over and work Mr. Parsons' inventions, and to pay him a royalty of 2*s.* 6*d.* per effective horse power on every machine sold. A licence dated December 4, 1894, in pursuance of this agreement was granted by Mr. Parsons to the company.

3. The respondent company built an experimental ship named the *Turbinia* and demonstrated the usefulness of the patents, which shortly proved a great success. It was therefore decided to wind up the respondent company, and to form a new company to work the patents.

4. The new company, called the Parsons Marine Steam Turbine Co., Ld., and hereinafter referred to as the new company, was accordingly formed in 1897, and resolutions dated July 14 and 30, 1897, were passed for the voluntary liquidation of the respondent company. By an agreement dated September 22, 1897, between the liquidators of the respondent company and the new company, the liquidators agreed to transfer all the respondent company's rights under the licence of December 4, 1894, and all its other assets to the new company in consideration of 30,000*l.* in cash, 80,000*l.* in fully paid shares, and a royalty for a term of years of 5*s.* per effective horse-power on every machine sold, out of which the liquidators would be able to satisfy the royalty payable by the respondent company of 2*s.* 6*d.* per effective horse-power to Mr. Parsons, and a formal assignment of the licence was executed by an indenture dated January 28, 1901. Under this assignment the respondent company had the right to receive twice yearly from the new company full and complete statements of all engines and machines sold by it: to inspect from time to time the operations and processes carried on at the works of the new company; to inspect the books and accounts of that company; to consent or refrain from consenting to persons in the employ of that company obtaining

or applying for the grant of letters patent for the use of improvements or additions to the inventions assigned, and to consent or refrain from consenting to the assignment of the benefit of the licence granted by the indenture of December 4, 1894, by that company to any other company person or firm.

5. Under the agreement of September 22, 1897, large sums became payable to the liquidators, and it was found inconvenient for the respondent company to continue in liquidation. On June 15, 1900, an order was obtained from the Court to stay the winding up of the respondent company, and since that date the respondent company has continued as a company to receive the sums to which it was entitled and to make distribution to its shareholders.

6. The agreement of September 22, 1897, had been modified and varied by subsequent agreements dated January 26, 1901, June 15, 1904, and April 21, 1915, entered into by the respondent company, Sir C. Parsons, and the new company, under the first of which the respondent company and Sir C. Parsons received certain shares in a company called the Parsons Foreign Patents Co. in lieu of royalties that would otherwise have been payable by the new company and the respondent company respectively: the two latter agreements extended the time for the payment of royalties and slightly varied their rate in some cases. These subsequent agreements did not substantially alter the position created by the agreement of September, 1897.

7. It appeared from the minute books of the respondent company that since 1897 beyond executing and carrying out the agreements above referred to nothing had been done by the respondent company in the years which fell under review for the purpose of this case except the formal business of receiving royalties and distributing dividends, and the respondent company had not in fact during those years engaged itself in any trade or business or in the manufacture of engines. The expenses in connection with the collection of the royalties were incurred and paid by the new company without consulting the respondent company and a proportion was charged to and paid by that company by deduction when the royalties

were paid as shown by its accounts. No part of the expenses of the new company in connection with experimental work on the patents was charged to or borne by the respondent company. The respondent company had no separate offices or staff and the new company did the secretarial work required by the respondent company for the calling of directors' or shareholders' meetings and the payment of dividends.

Counsel for respondent company contended that the respondent company was not liable to excess profits duty, that it was not carrying on any trade or business within the meaning of the Finance (No. 2) Act, 1915, Part III. (1), but was in receipt of an income from property, and that if it had been the intention of the Act to tax royalties or other income arising from property special provisions for that purpose would have been inserted.

The inspector of taxes on behalf of the Commissioners of Inland Revenue supported the assessment.

The Commissioners for Special Purposes were of opinion that no trade or business was being carried on by the respondent company, and that therefore the Finance (No. 2) Act, 1915, Part III., had no application, and they allowed the appeal of the respondent company.

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(1) Finance (No. 2) Act, 1915:—

"PART III.

"EXCESS PROFITS DUTY."

Sect. 38: "(1.) There shall be charged, levied, and paid on the amount by which the profits arising from any trade or business to which this part of this Act applies, in any accounting period which ended after the fourth day of August nineteen hundred and fourteen, and before the first day of July nineteen hundred and fifteen, exceeded, by more than two hundred pounds, the pre-war standard of profits as defined for the purposes of this Part of this Act, a duty (in this Act referred to as 'excess profits duty') of an amount equal to fifty per cent. of that excess."

Sect. 39: "The trades and businesses to which this part of this Act applies are all trades or businesses (whether continuously carried on or not) of any description carried on in the United Kingdom, or owned or carried on in any other place by persons ordinarily resident in the United Kingdom, excepting—(*a*) husbandry in the United Kingdom; and (*b*) offices or employments; and (*c*) any profession the profits of which are dependent mainly on the personal qualifications of the person by whom the profession is carried on and in which no capital expenditure is required, or only capita expenditure of a comparatively small amount, but including the business of any person taking commissions in respect of any transactions or services rendered, and of any agent of any description (not being a commercial traveller, or an agent whose remuneration consists wholly of a fixed and definite sum not depending on the amount of business done or any other contingency)."

Sir Gordon Hewart A.-G. and *T. H. Parr* for the Commissioners of Inland Revenue, appellants. The respondent company was properly assessed to excess profits duty by the appellants. The Finance (No. 2) Act, 1915, Part III., contains the provisions relating to the excess profits duty. By s. 38, sub-s. 1 (1), the duty shall be charged upon the excess profits arising from any "trade or business" to which that part of the Act applies; and by s. 39 (1) the "trades and businesses" to which that part of the Act applies are practically all trades and businesses with certain immaterial exceptions. By the latter section certain of these trades and businesses are trades and businesses "owned or carried on," and a trade or business may thus be within the Act which is merely owned by a person without being actively prosecuted.

On the true construction of these provisions, the word "business" is there used in its ordinary sense. The word "business" is of more extensive signification than the word "trade": per Willes J. in *Harris* v. *Amery*. (2) The word "business" is a word of large and indefinite import, and includes anything which occupies the time, attention and labour of a man for the purpose of profit: *Smith* v. *Anderson* (3) per Jessel M.R., whose observations on this point were not disapproved when the case afterwards came before the Court of Appeal. The word means almost anything which is an occupation or a duty requiring attention: per Lindley L.J. in *Rolls* v. *Miller*. (4) The respondent company is carrying on a business within the meaning of the Act of 1915. The objects for which it was originally formed—namely, the acquisition under the agreement of 1894 and the licence granted pursuant thereto, of the patents for the turbine engine, and of the right to manufacture and sell the engine—were purely business objects. For a time it actually carried out these objects itself, building a ship equipped with the engine which was highly successful. In 1897 the respondent company no doubt went into voluntary liquidation, and transferred the patents and the licence and other assets to a new company; but it made the transfer in consideration, besides money and shares, of a royalty on the engines sold by the new company, and of collateral rights to receive full statements of all engines sold, to inspect the operations and the accounts of the new company, and to prohibit the transfer of the licence to any other person. The respondent company continues to be a registered company, having a memorandum and articles of association, and a board of directors, and to perform active functions in receiving royalties, paying expenses and directors' fees, keeping a profit and loss account, and investigating the affairs of the new company. It retains some part of its original business, and, although it has assigned the bulk of it to the new company, it receives a royalty as the equivalent thereof. In these circumstances it still carries on a business, and, as it earns excess profits therefrom, it is liable to be assessed to excess profits duty in respect thereof. Where the owners of a steam drifter chartered her to the Government and merely received payments of freight under the charter party, they were held to be engaged in a trade or business upon the profits of which they were liable to excess profits duty under the Act of 1915 (*Sutherland* v. *Inland Revenue Commissioners* (1)); and, similarly, the respondent company which has assigned its undertaking to a new company subject to a royalty should be held to be within the Act. By the Fourth Schedule, Part II., clause 6, of the Act, where any business is confined to the management of any particular assets, but power exists to substitute other assets, the substitution shall not be deemed to constitute a change of ownership; and, consequently, the substitution by the respondent company for their original assets of other assets including a royalty does not constitute a change of ownership of the business relieving the respondent company from liability to excess profits duty.

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(1) Note (1) last page.

(2) (1865) L. R. 1 C. P. 148, 154.

(3) (1880) 15 Ch. D. 247, 258.

(4) (1884) 27 Ch. D. 71, 88.

Royalties are profits of a business for the purposes of the

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(1) (1918) 55 S. L. R. 674.

Act. By s. 40, sub-s. 1, the profits of any trade or business in respect of which excess profits duty is chargeable, are to be determined on the same principles as for the purpose of income tax subject to the modifications in the Fourth Schedule, Part I.; and by clause 2 of that part of that schedule the principle of the Income Tax Acts that deductions are not allowed for royalties is not to be followed. There is some express authority for saying that the receiving of royalties constitutes the carrying on of a business. In *In re Ralph's Trade Mark* (1), as reported in the Law Journal Reports, Pearson J. is represented as having observed during the argument: "Can it be said that a patentee 'is not engaged in any business concerned in the goods' while he is receiving royalties from the actual manufacturers?" although no doubt the observation does not appear in the report of the same case in the Law Reports. (2)

The Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 1, sub-s. 2, provides that no company shall be formed for the purpose of carrying on any business for the acquisition of gain unless it is registered under that Act. The respondent company would not have been registered under that Act unless it had been formed for the purpose of carrying on business, and the fact that it continues to be so registered must be taken to imply that it is still carrying on business.

The Special Commissioners have found all the material facts, and the only question is whether having regard to these facts the respondent company own or carry on a business within the meaning of the Act of 1915. That is not a question of fact but of law only: per Lord Parker in *Farmer* v. *Cotton's Trustees* (3); and an appeal therefore lies from the decision of that question of these Commissioners.

Gore-Browne K.C. (*A. M. Latter* with him) for the respondent company.

The respondent company ought not to be assessed to excess profits duty. An occupation is not a "trade" or "business" within the meaning of s. 38 or s. 39 of the Finance (No. 2) Act, 1915 (4), unless it is actively prosecuted. Under the latter section a trade or business is a trade or business to which the Act applies not by being "owned in the United Kingdom," but only by being "carried on in the United Kingdom." The wide dicta of Jessel M.R. in *Smith* v. *Anderson* (1), in regard to the meaning of the word "business" were not adopted on appeal by the Lords Justices whose statements are of a more guarded character. The respondent company is not carrying on a "business" within the meaning of the Act of 1915. Originally, no doubt under an agreement with the inventor and a licence from him, the respondent company did own and for a time carry on the business of completing and testing and of manufacturing and selling the steam turbine engine. In 1897, however, it went into liquidation, and transferred all its rights under the licence, and all its machinery, tools and other assets to the new company in consideration of certain money and shares and of a royalty on each engine sold by the new company. It thus parted with all its property and means of working, and retained no interest therein except the mere right to receive the royalty. It thereupon ceased to carry on any business, and consequently is not liable to be assessed to excess profits duty. This view is borne out by several decided cases.

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(1) (1883) 53 L. J. (Ch.) 188, 189.

(2) 25 Ch. D. 194.

(3) (1915) 6 Tax. Cas. 590, 600.

(4) See note (1) Ante, p. 196.

In *Smith* v. *Anderson* (1) the Court of Appeal held, overruling the judgment of Jessel M.R., that a body of persons who had certificates entitling them to their proportions of certain funds vested in trustees did not carry on a "business" within the meaning of the Companies Act, 1862 (25 & 26 Vict. c. 89) (repealed). In *Muat* v. *Stewart* (2) it was held by the Scottish Court of Session that a building occupied by a landed proprietor as an estate office for receiving rents and granting leases from which rents would be received was not within the exemption granted by the Customs and Inland Revenue Act, 1878 (41 & 42 Vict. c. 15), s. 13, sub-s. 2, to premises occupied solely for the purpose of any trade or business, and that it was properly assessed to inhabited house duty. The contention of the respondent company is also supported by *In re Clayton's Trusts, Clayton* v. *Clayton.* (3)

(1) 15 Ch. D. 247.

(2) (1890) 2 Tax. Cas. 601.

(3) July 18, 1917—Eve J. Unreported.

It appears from several other provisions of the Act of 1915, that where a person merely receives royalties or instalments of an annuity, these payments should not be deemed to be profits of a business in respect of which he is liable to excess profits duty. Thus, s. 43, sub-s. 1, provides that a person to whom there is payable as rent in respect of the right to work minerals an amount which exceeds the pre-war standard of that rent, besides being liable to pay mineral rights duty, shall pay an additional amount equal to 50 per cent. of the excess; and it cannot be intended that that rent should be treated as the profit of a business in respect of which the person who receives it should be liable to excess profits duty as well as to the other two mineral duties. Again, s. 35 provides that where any person has paid excess profits duty, the amount so paid shall be allowed as a deduction in computing profits for the purpose of the next payment of income tax ; showing that a person receiving royalties is not intended to be assessed to the excess profits duty inasmuch as he would not be allowed to make the deduction under the section because the income tax would have been deducted from the royalty before he received it. Further, the Fourth Schedule, Part I., clause 8, provides that in estimating profits for the purpose of these Acts no account shall be taken of income from investments and consequently in estimating profits for the purpose of excess profits duty no account should be taken of royalties which are a species of income from investments.

The finding of the Special Commissioners that the respondent company does not carry on business is a finding of fact from which no appeal lies.

T. H. Parr in reply. In *Muat* v. *Stewart* (1) the landed proprietor derived no profit from the building there in question, and that case cannot therefore be of any assistance in considering whether in a given case there should be an assessment to excess profits duty which can only be assessed upon profits.

The fact that a person who pays excess profits duty may not be allowed under s. 35 to deduct the amount for the purpose of income tax is no ground for saying that he is not liable

(1) 2 Tax. Cas. 601.

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to be assessed to that duty. The mineral rights duty and the additional duty imposed in connection therewith by s. 43 are entirely different duties from the excess profits duty, and it does not follow that in a case in which these duties are paid, the excess profits duty cannot also be charged. As to the Fourth Schedule, Part I., clause 8, royalties are not income from investments and therefore that clause does not prevent them from being takers into account for the purpose of estimating profits for the purpose of excess profits duty.

ROWLATT J. Although this case involves a large sum of money, I think it is reasonably clear how it ought to be decided. In my judgment the appeal of the Crown fails. The Finance (No. 2) Act, 1915, Part III., which commences with s. 38 of the Act, is the part relating to excess profits duty. By s. 38, sub-s. 1, that duty is to be charged on the excess profits as there defined arising from any "trade or business" to which that part of the Act applies; and by s. 39 the trades and businesses to which that part of the Act applies include all trades and businesses carried on in the United Kingdom, with certain exceptions which are not material for the purposes of this case.

The question is whether the profits in respect of which the appellants make this claim to excess profits duty are profits arising from any "business" carried on in this country by the respondent company within the meaning of these provisions. It has been said on behalf of the appellants that the word "business" is a very wide word. That word, in whatever sense it be understood, is undoubtedly an elastic word capable of wide extension; but it must be borne in mind that it is also a word which has two virtually distinct meanings. It may mean any particular matter or affair of serious importance. This meaning of the word may be illustrated by a few examples. When a private person goes to consult professionally his banker or his solicitor it may properly be said that he goes to see him on business. In the same way any serious matter affecting the resources of a trust, a school, a church or a charity may be spoken of as business relating to the particular institution, and a person dealing with any matter of that kind is dealing with a matter of business. To take a further example from the present case, if a director of the respondent company were to go to its premises for the purpose of doing some purely formal act, or, if a shareholder were to go to the premises for the purpose of looking into the accounts relating to these royalties, he would no doubt be attending there on a matter of business.

The word "business," however, is also used in another and a very different sense, as meaning an active occupation or profession continuously carried on, and it is in this sense that the word is used in the Act with which we are here concerned. I have therefore to ask myself whether the respondent company is carrying on a "business" in this latter sense. Originally that company, having entered into an agreement to take over the patents and obtained a licence in pursuance thereof, did intend itself to continue working the patents and constructing and selling the turbine engines to which the patents related, and if it had done so it would undoubtedly have carried on a business in this sense of the word. Meanwhile, however, it found a more excellent way. It went into voluntary liquidation, and its liquidators on its behalf sold all its rights under the agreement and under the licence and all its other assets to a new company, taking in consideration, besides a sum of money and certain shares in the new company, a royalty resting upon covenant for a term of years which is about shortly to expire, that covenant being fortified by the usual collateral covenants to enable the respondent company as the party entitled to the royalty to inspect the books and accounts of the new company. The royalties were in effect payment by instalments of part of the price of the property which the respondent company had finally disposed of to the new company. The right to the royalties is practically the only interest in the undertaking that the respondent company retains. It has nothing to do but simply to receive these royalties. I have listened with great care to the case which has been presented on behalf of the appellants, but it seems to me really unarguable. If any private person

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occupied the position which the respondent company occupies, it would be almost ludicrous to speak of him as carrying on a business. It is said that the respondent company is not a private individual but an incorporated company, and that no doubt it still is. When it found that these royalties were likely to continue to be paid for some years, it thought that it would be best to stay the winding up and thus to continue the existence of the company, which was by no means a very active existence, until these royalties had ceased to be payable. It is contended on behalf of the Crown that the respondent company merely because it continues to exist for the purpose of receiving these moneys, and is a registered company, is carrying on "business" within the meaning of the Act. I am unable to come to that conclusion. The respondent company have ceased to carry on the business which they originally carried on, and are now merely receiving royalties for a certain number of years in part payment for the business and the assets of the business with which they have parted. In these circumstances I am of opinion that they are not carrying on business within the meaning of the Act.

I therefore think that this appeal should be dismissed with costs.

Appeal dismissed.

Solicitor for appellants: *Solicitor of Inland Revenue.*

Solicitors for respondents: *Crossman, Block, Matthews & Crossman, for Dees & Thompson, Newcastle-upon-Tyne.*

J. R.

In re MACDONALD.
Ex parte McCULLUM.

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June 17 ;
July 14, 15.

Bankruptcy—Post-nuptial Settlement—Purchaser for valuable Consideration—Substitution of voluntary Settlement on Wife for voluntary Allowance—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 42, *sub-s.* 1.

By an ante-nuptial settlement made in 1900 the debtor settled investments in certain railway and other stocks upon trust (inter alia) for the bankrupt for life. In 1913 arrangements were made by the debtor which resulted in the income from the investments comprised in the marriage settlement being thenceforward paid to the wife. In March, 1914, the debtor and his wife agreed to separate, and in order to insure to the wife the continued payment of the income, the debtor in March, 1915, executed a post-nuptial deed under which the debtor's life interest under the marriage settlement was surrendered to the wife, and she was given a power of appointment which might act in derogation of the debtor's ultimate reversion to the property. There was no agreement by the wife that she would not take proceedings against the debtor for maintenance. In July, 1917, the debtor committed an act of bankruptcy, and in January, 1918, an order of adjudication was made against him. It was not proved that at the time of executing the deed of March, 1915, the debtor was able to pay all his debts without the aid of the property comprised in it:—

Held, that upon the facts the true inference to be drawn was that the wife was not a purchaser for valuable consideration within the meaning of s. 42, sub-s. 1 of the Bankruptcy Act, 1914, and that instead of a voluntary allowance to his wife the debtor substituted a voluntary settlement; and as in these circumstances there was no consideration given for it, the deed of March, 1915, was void so far as was necessary for the payment of the debts owing by the debtor and the costs of the bankruptcy.

MOTION on behalf of the trustee of the estate of the bankrupt, Sir A. J. Macdonald, Bart., for (inter alia) a declaration that an indenture dated March 5, 1915, made between the bankrupt of the first part, Lady Macdonald his wife, of the second part, and the trustees under the indenture of the third part, was void so far as was necessary for payment of the debts owing by the bankrupt and the costs of the bankruptcy under s. 42 of the Bankruptcy Act, 1914. (1).

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(1) Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 42, sub-s. 1: "Any settlement of property, not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made

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The respondents to the motion were originally the trustees of the indenture of March 5, 1915, only, but upon an application on behalf of Lady Macdonald the motion was ordered to be adjourned and Lady Macdonald to be added as a party to the motion in the meantime.

By an ante-nuptial settlement dated January 9, 1900, the debtor conveyed to the trustees of the settlement investments in certain railway and other stocks upon trust from and after the solemnization of the marriage (which shortly afterwards took place) to pay the annual income of the trust fund to the bankrupt during his life and after his death to his wife if she should survive him during the residue of her life or until she should marry again, but so that during her coverture she should not have power to alienate or charge her expectant life interest, and from and after the death of the bankrupt and the death or marriage again of the wife the capital and income of the trust fund was to be held in trust for all or such one or more exclusively of the other or others of the issue of the intended marriage whether children or remoter issue at such time and if more than one in such shares and with such gifts over and such provisions for maintenance advancement or otherwise at the discretion of any person or persons and generally in such manner for the benefit of such issue or some or one of them as the bankrupt should from time to time by deed revocable or irrevocable or by will or codicil appoint and in default of and until and subject to any such appointment then as the wife should after the death of the bankrupt (but so long only as she should continue his widow) in like manner appoint and it was thereby agreed that if there should not

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on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in the bankruptcy, and shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of the settlement, be void against the trustee in the bankruptcy, unless the parties claiming under the settlement can prove that the settlor was, at the time of making the settlement, able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property passed to the trustee of such settlement on the execution thereof."

be any child of the marriage who should attain a vested interest under the trust thereinbefore declared in default of appointment then subject to the trusts and powers thereinbefore declared and contained the trust fund and the income and statutory accumulations (if any) of the income thereof or so much thereof as should not have become vested or been applied under any of the trusts or powers affecting the same should after the death or marriage again of the wife and such failure of children as aforesaid be held in trust for the bankrupt his executors administrators, and assigns absolutely.

By an indenture dated March 5, 1915 (which was indorsed "Deed of Variation supplemental to Marriage Settlement, dated January 9, 1900"), made between the bankrupt of the first part Lady Macdonald his wife of the second part and the trustees of the indenture of the third part after reciting that these presents were intended to be supplemental to the settlement of January 9, 1900, under which the debtor was tenant for life of the trust funds thereby settled and that he was desirous of making such further provision for the wife as thereinafter appeared, the indenture, made in pursuance of the premises and in consideration of the natural love and affection of the debtor for his wife, witnessed and it was thereby agreed and declared that during the joint lives of the bankrupt and his wife the income of the trust funds should notwithstanding anything to the contrary contained in the settlement be paid by the trustees or trustee for the time being of the settlement to the wife for her separate use without power of anticipation, and if there should not be any child of the marriage who should attain a vested interest under the trusts declared by the settlement and if the wife should not marry again the trust funds and the income and statutory accumulations (if any) of the income thereof or so much thereof as should not have become vested or been applied under any of the trusts or powers affecting the same should be held in trust for such persons at such ages and times and in such manner as the wife should by any deed or deeds or by her last will or any codicil or codicils thereto appoint but so that no such appointment should be valid if the wife should marry again and in default of any such appointment and in so far as any such appointment should not extend the premises should be held in trust for the bankrupt his executors administrators and assigns absolutely. It was further provided that the settlement should be deemed to be varied so far as might be necessary to give effect to the provisions of this indenture but except to that extent nothing therein contained should accelerate any other charges estates or interests under the settlement thereby limited to take effect in possession in or after the death of the bankrupt or the wife. The yearly income from the funds without deduction of income tax amounted to 175*l* 13*s.* 8*d.*

There had been no issue of the marriage and the debtor and his wife had lived apart since 1914. From the date of the indenture of March 5, 1915, the trustees had paid the income on the trust funds to the wife.

On July 18, 1917, the bankrupt committed an act of bankruptcy by failing to comply before that date with the requirements of a bankruptcy notice on which a petition was presented on August 10, 1917, a receiving order being made thereunder on November 7, 1917, and an order of adjudication on January 30, 1918.

The total liabilities for which proofs had been admitted amounted to 1180*l* 18*s.* 2*d.*

No assets had been recovered and no dividend paid to the creditors.

In opposition to the motion an affidavit made by Lady Macdonald was filed which (so far as material) was as follows : " In the year 1913 I had a conversation with a cousin of mine who informed me that on the occasion of her marriage provision had been made for an immediate income for her own absolute use. At that time I was living with the debtor in Bexhill, and I mentioned this to him and pointed out that no similar provision had been made for me. He at once suggested that the income arising from the trust funds under our marriage settlement should be paid into an account at Lloyds Bank, Bexhill, to be opened in my name, and that I should have such income for my own absolute use.

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"Arrangements were accordingly made by the debtor which resulted in the income from that time being paid into my account at the Bexhill branch of Lloyds Bank, Ld. The account was operated upon by me for my own benefit.

"From the date of my marriage down to this time I had always received from the debtor all monies which we required for housekeeping, etc., and after this date I continued to obtain from him as before, all monies which were required for that purpose.

"In March, 1914, the debtor and I agreed to separate, and the question arose as to my means of livelihood. The debtor agreed with me that for my maintenance in the future I should receive the income which he had previously placed at my disposal as above mentioned.

"During the whole of our married life up to this time the debtor had spent money lavishly, but I never experienced any difficulty in obtaining all that I required from him.

"After March, 1914, I frequently met the debtor and we were on friendly terms. On one of these occasions I pointed out to him that he should execute a document confirming the arrangement previously agreed upon under which the income of the trust funds was being paid to me. I desired this as I felt my position was precarious owing to the debtor's mode of living, as I had no other income and was in a state of health which prevented me from being able to work. The debtor agreed to consult a solicitor with a view to ascertaining what steps were necessary to insure to me the continued payment of the income whatever happened to him, and he subsequently informed me that he had seen" a solicitor.

"Later I saw" the solicitor, "who informed me that he had advised that a deed should be entered into between us varying the terms of the marriage settlement, whereby the income from the trust funds which under the marriage settlement was payable to the debtor for life should be made over absolutely to me.

"Later I attended" at the solicitor's "office and executed the indenture" of March 5, 1915.

"At that time I had absolutely no reason to doubt that the debtor was absolutely solvent. . . . . Immediately I mentioned the matter to the debtor he seemed most anxious to do all that was necessary on my behalf.

"From March, 1914, down to the present time I have never received any money from the debtor other than the income arising from the said trust funds."

The learned judge after hearing the evidence of the trustee in bankruptcy came to the conclusion that on the evidence as it stood it was quite impossible to hold that it had been proved that the debtor was at the time of executing the indenture of March 5, 1915, able to pay all his debts without the aid of the property comprised in the indenture.

Hansell for the trustee in bankruptcy.

Tindale Davis for Lady Macdonald. On the facts Lady Macdonald is a "purchaser . . . . for valuable consideration" within the meaning of s. 42, sub-s. 1, of the Bankruptcy Act, 1914. The debtor was under an obligation to maintain her, and on their separation they agreed that, for the purpose of relieving him from the obligation to support her, she should have an immediate right to the income of the fund and a further power of appointment over it. The deed of March 5, 1915, confirmed the agreement and relieved the debtor from the obligation of maintaining his wife.

[HORRIDGE J. Lady Macdonald does not say in her affidavit that she relinquished the right to maintenance.]

After the execution of the deed the wife could not have succeeded upon a summons against her husband taken out by her for maintenance. The settlement of March 5, 1915, would be a complete answer to the summons. Very little is necessary to constitute a purchaser for valuable consideration within the meaning of s. 42 of the Act of 1914: *Hance* v. *Harding* (1); *In re Pope* (2); *In re Collins* (3). If a legal right is relinquished, the person relinquishing it becomes a purchaser within the meaning of the section. It is open to

(1) (1888) 20 Q. B. D. 732. (2) [1908] 2 K. B. 169.
(3) (1914) 112 L. T. 87.

the Court to draw the inference that Lady Macdonald gave up the right to be supported by her husband. She has not received any income from him since March, 1914, when the arrangement confirmed by the deed was made.

Maddocks for the trustees of the settlement of March 5, 1915, submitted to any order the Court might think fit to make.

HORRIDGE J. This is an application under s. 42 of the Bankruptcy Act, 1914, that the deed dated March 5, 1915, described in an indorsement upon it as "Deed of Variation Supplemental to Marriage Settlement, dated January 9, 1900," may be set aside so far as is necessary for payment of the debts owing by the bankrupt.

Under the marriage settlement a life interest in the property was reserved to the bankrupt, and by the deed of variation that life interest was surrendered to Lady Macdonald, his wife. The deed of variation not only did away with his life interest but gave an extra power of appointment to Lady Macdonald, which might act in derogation of his ultimate reversion to the property. There was therefore a settlement made within ten years of the bankruptcy. Dealing with those portions of s. 42 which do not apply to this case, this was not a settlement made in consideration of marriage, nor a settlement made of property which had accrued to the settlor in right of his wife, nor had the bankrupt become bankrupt within two years of the settlement, but he had become bankrupt within ten years of the settlement, and therefore unless the persons taking the benefit under the settlement can prove that it was made in favour of a purchaser or an incumbrancer in good faith and for valuable consideration, or that the settlor was able to pay all his debts without the aid of the property comprised in the settlement, that settlement becomes void by reason of the provisions of s. 42. I have heard the evidence of the trustee, and on his evidence, and on the evidence as it stands before me, it is quite impossible to say that it has been made out that the settlor was able to pay all his debts without the aid of the property comprised in the settlement, and the only remaining question therefore is whether the settlement was made in good faith and for valuable consideration in favour of a purchaser or incumbrancer. Upon behalf of Lady Macdonald it was contended that the settlement was so made. I think I must take the definition of "purchaser or incumbrancer in good faith and for valuable consideration" from the language of Cozens-Hardy M.R. in *In re Pope* (1) who said: "I think it means a person who has given something in consideration of the settlement, or, to use the language of Sir James Hannen, a quid pro quo." In *In re Pope* (1), the wife had bargained that she would not commence proceedings in the Divorce Court, the costs in which would have been payable by the husband, whatever the result of the proceedings might have been. She had, in agreeing not to take those proceedings also, in effect, bargained that she would not apply for alimony to the Divorce Court. Further there was the inducement to the husband held out by her not taking proceedings that he would not have the exposure of the case being tried in the courts. On behalf of Lady Macdonald it was contended that the matters set out in her affidavit show a consideration. What is the true inference to be drawn from the statements in that affidavit? In my judgment the true inference is that instead of a voluntary allowance to his wife for maintenance, the bankrupt gave her a voluntary settlement. Under those circumstances there was no consideration by the wife. She did not even bargain that she would not take proceedings before a magistrate for maintenance. There was no consideration whatever for this settlement, and I must therefore make a declaration that the indenture of March 5, 1915, is void so far as is necessary for the payment of the debts owing by the bankrupt and the costs of the bankruptcy, and an order directing the respondents to pay to the applicant all income payable to the bankrupt. The costs of the applicant and trustees of the settlement of March 5, 1915, to be paid by Lady Macdonald, and in the event of Lady Macdonald not paying the costs of the trustees

(1) [1908] 2 K. B. 169, 172.

of the settlement they to take the costs as between solicitor and client out of the trust funds.

Declaration and order accordingly.

Solicitor for trustee in bankruptcy: *Charles Humphries.*

Solicitors for Lady Macdonald: *Amery, Parkes & Co.*

Solicitors for trustees of settlement of March 5, 1915: *Bircham & Co.*

J. E. A.

[COURT OF CRIMINAL APPEAL.]

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Criminal Law—Charge of Murder—Prosecutor—Defence involving Imputations on Character of deceased Man—Cross-Examination of Prisoner as to other Offences—Admissibility of Evidence—Criminal Evidence Act, 1898 (61 & 62 *Vict. c.* 36), *s.* 1 (*f*).

The appellant was indicted for murder. The defence set up was that the act had been done in self-defence, the killed man having made improper overtures to the appellant, and on these being rejected had violently assaulted him. Questions were addressed to the appellant in cross-examination which had no relevance to the charge of murder, but which tended to show that the appellant had previously committed an offence other than that for which he was being tried. No evidence had been given or questions asked to show that the appellant had a good character. The questions although objected to, were admitted on the grounds (1.) that the dead man was the prosecutor and that the defence involved an imputation upon his character; and (2.) because they tended to show that the appellant did not always speak the truth. The appellant was convicted of manslaughter and appealed:—

Held, that the questions were not admissible on the ground that the defence involved an imputation on the character of the dead man inasmuch as he was not the prosecutor within the meaning of s. 1 (*f*) of the Criminal Evidence Act, 1898, and (2.) that the questions were not admissible to prove that the appellant did not always speak the truth, and that therefore the conviction must be quashed.

APPEAL to the Court of Criminal Appeal against a conviction for manslaughter.

The appellant was indicted at the Central Criminal Court upon a charge of having murdered on July 4, 1919, a man named John Thomas Gregory.

The appellant, who was a young man eighteen years of age, left Sheffield, where his home was and where he had previously been employed in a stockbroker's office, about the end of May, 1919, and came to London to get employment. In the course of his inquiries he became acquainted with the deceased man Gregory who kept a wine shop at Hendon. Gregory was found killed in his wine shop on the afternoon of July 4, 1919. The appellant when arrested made a statement to the police in which he admitted that he killed Gregory but alleged that he had done so in self-defence. He said that Gregory had invited him to his shop and had there made improper overtures to him which he had refused to comply with; that Gregory had then made a violent attack upon him. A struggle took place, in which he struck Gregory in self-defence. At the close of the statement the appellant said: "At the time I was struggling with Gregory I felt that if I did not do him in, he would do me in."

At the trial no questions were asked of the witnesses for the prosecution with a view to establish the good character of the appellant, nor did the appellant himself give evidence as to his own good character.

When the appellant was cross-examined several questions were put to him by counsel for the Crown as to the source from which he obtained the money to live upon when he came to London in April, 1919, with a young woman with whom he lived as his wife, he being then out of employment. The appellant at first returned evasive answers to these questions, but ultimately said that he obtained the money by the sale of shares which he had induced his then employers to buy for him by making false representations to them to the effect that he was entitled to a certain sum of money when he came of age. None of the questions had any relevance to the charge of murder.

Objection was taken to the admissibility of the questions. The judge however held that they were admissible upon the ground that the defence set up by the appellant involved an imputation upon the character of the prosecutor—namely, the dead man; and also because the questions tended to show that the appellant did not always tell the truth.

The jury found the appellant not guilty of murder, but guilty of manslaughter, and he was sentenced to twelve months' imprisonment with hard labour.

Valetta and *A. A. Baerlein* for the appellant. As no evidence had been given at the trial as to the good character of the appellant counsel for the prosecution was not entitled under s. 1 (*f*) of the Criminal Evidence Act, 1898 (1), to put questions to the appellant tending to show that he had committed an offence other than that for which he was being tried—namely, that of obtaining credit by false pretences, or to show that he was a person of bad character. It is not necessary that a prisoner should be asked the simple question whether he has committed a particular offence. Any question or series of questions which would reasonably lead a jury to believe that it was being imputed to the prisoner that he had committed another offence would tend to show that the prisoner had committed that other offence, and it does not in the least depend on the object with which the questions are put: *Rex* v. *Ellis*. (2) The questions that were put had no relevance to the charge of

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(1) Criminal Evidence Act, 1898, s. 1: "Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person. Provided as follows:—

. . . . . .

"(*f*) A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless—

. . . . . .

"(ii.) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution."

(2) [1910] 2 K. B. 746, 757.

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murder. Channell J. pointed out in *Rex* v. *Preston* (1) that the section meant that if the defence was so conducted, or the nature of the defence was such, as to involve the proposition that the jury ought not to believe the prosecutor or one of the witnesses for the prosecution upon the ground that his conduct—not his evidence in the case, but his conduct outside the evidence given by him—made him an unreliable witness, then the jury ought also to know the character of the prisoner who either gave that evidence or made that charge, and it then became admissible to cross-examine the prisoner as to his antecedents and character with the view of showing that he had such a bad character that the jury ought not to rely upon his evidence. In the present case however no attack was made upon the conduct of the prosecutor or of any of the witnesses for the prosecution. The dead man was not the prosecutor in the present case. The words in the section "imputations on the character of the prosecutor or the witnesses for the prosecution" mean imputations on the character of someone who has given evidence. The observation of Channell J. in *Preston's Case* (2) "that the jury ought not to believe the prosecutor," connotes that the prosecutor has given evidence. Hamilton J. held in *Rex* v. *Westfall* (3) that imputations made against persons not called as witnesses do not come within the words of the section so as to let in cross-examination as to the prisoner's antecedents and character: see also Archbold's Criminal Pleading, 25th ed., p. 448. Even if the dead man was the prosecutor imputations against his character would not let in cross-examination as to the antecedents of the appellant, as the imputation on the character of the dead man was an essential element in the defence.

Eustace Fulton for the Crown. A prosecutor need not be a person who gives evidence. The Indictable Offences Act, 1848 (11 & 12 Vict. c. 42), contains separate forms of recognizance for binding over a person to prosecute and binding over a person to prosecute and give evidence. The dead man was the prosecutor in this case within the meaning of s. 1 (*f*) of the Criminal Evidence Act, 1898, and as the nature of the defence was such as to involve an imputation upon his character the appellant was liable to be cross-examined as to his antecedents and character. If the dead man was not the prosecutor there is no person to whom that term in the statute would apply and the object of the statute would be frustrated. The term " prosecutor " is not a term of art and it is therefore necessary to look at the statute to see what it means. The origin of a private prosecution was a personal wrong and the prosecution was carried on by the person wronged or by his heir-at-law. The Legislature never intended that a person who committed murder should enjoy a greater immunity as regards cross-examination than he would have enjoyed if the person injured had not died.

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(1) [1909] 1 K. B. 568, 575. (2) [1909] 1 K. B. 575.
(3) (1912) 76 J. P. 335.

[EARL OF READING C.J. The imputations upon the character of the dead man were a necessary element in the defence.]

[AVORY J. In a prosecution for rape the prisoner cannot be cross-examined as to his antecedents and character merely because questions have been put to the woman alleging that she consented.]

It is necessary for a woman who alleges that she has been raped to prove that she was not a consenting party, but there is no similar onus of proof in the case of murder. Lord Alverstone C.J. dealt with this point in *Rex* v. *Hudson*. (1) He said : " We think that the words of the section, ' unless the nature or conduct of the defence is such as to involve imputations,' etc., must receive their ordinary and natural interpretation, and that it is not legitimate to qualify them by adding or inserting the words ' unnecessarily,' or ' unjustifiably,' or ' for purposes other than that of developing the defence,' or other similar words." That case has always been understood to mean that the mere fact that an attack has been made on the character of the prosecutor or of a witness for the prosecution is sufficient to bring the case within the statute and to enable the prisoner to be cross-examined as to his

(1) [1912] 2 K. B. 464, 470.

character or previous convictions. The earlier cases in which the contrary was laid down must be taken to have been overruled. The cross-examination was also admissible for the purpose of testing the truthfulness of the appellant.

The jury acquitted the appellant on the charge of murder and found him guilty only of manslaughter. They therefore were probably not influenced by the evidence that the appellant had been guilty of fraud on a previous occasion, and therefore the Court ought to apply the proviso to s. 4 of the Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), and hold that no substantial miscarriage of justice occurred.

Valetta in reply. The Court held in *Rex* v. *Rodley* (1) that it would not act upon the proviso to s. 4 of the Act of 1907 in any case in which it appeared clear that the jury might have been influenced by the evidence wrongly admitted. It is impossible to say that the jury in the present case might not have been influenced by the evidence as to the appellant's character. It is not necessary to say that the jury must have been so influenced.

The judgment of the Court (Earl of Reading C.J., Avory and Sankey JJ.) was delivered by

EARL OF READING C.J. The appellant was indicted upon a charge of murder, and was convicted of manslaughter and sentenced to imprisonment for twelve months with hard labour. He appeals to this Court against his conviction on the ground that a cross-examination was improperly addressed to him contrary to the provision of s. 1 (*f*) of the Criminal Evidence Act, 1898. The deceased man, Gregory, was found dead on the afternoon of July 4, 1919, in a wine shop. It appears that the appellant admitted, in a statement which he made to the police, that he killed Gregory, but he said that he did it in self-defence because Gregory made improper overtures to him, and upon his refusing to comply with those overtures Gregory had violently attacked him. The appellant added at the end of the statement: "At the time I was struggling with Gregory I felt that if I did not do him in he would do me

(1) [1913] 3 K. B. 468, 475.

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in." In substance the appellant's defence was that he did acts of violence in consequence of the improper overtures and threatened violence of the deceased man towards the appellant when he refused to comply with the deceased man's wishes. It is quite clear, as the learned judge said in his summing up to the jury, that if the appellant was really placed in the dilemma that Gregory would kill him unless he killed Gregory and that he made up his mind to kill Gregory and killed him, that would justify the jury in returning a verdict of not guilty. The judge also directed the jury that if the appellant used more violence than was really necessary in the circumstances that would justify a verdict of manslaughter. It is unnecessary to state the facts more fully than I have done.

During the cross-examination of the appellant a number of questions were put to him by counsel for the Crown which had the effect of extracting admissions from him that he had obtained money by making false representations, and which amounted to obtaining money by false pretences. The questions put to the appellant had no relevance whatever to the charge of murder on which he was being tried; they related only to transactions by the appellant which might be properly described as discreditable to him, and which involved the admission by him of having committed another crime. An objection was taken to the cross-examination, but the judge came to the conclusion after hearing argument that the evidence was admissible upon the two grounds put forward by counsel for the Crown. The first of these was that the defence set up on behalf of the appellant involved imputations upon the character of the prosecutor—namely, that he had made the disgraceful overtures to the appellant, and it was alleged that the prosecutor was the dead man. We are however of opinion that the deceased man was not the prosecutor. There was neither the will nor the intention on his part to prosecute. He was dead and could take no part in the proceedings. We are therefore of opinion that the cross-examination could not be justified upon that ground. It was said that the Legislature must have intended to include a case like this where a man had been killed and attacks were made

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by the defence upon his character. It is sufficient to say that the Legislature has not used language which would justify us in drawing that inference. We must give the language used in the statute its ordinary meaning. By no reasonable stretch of the language used can it be said that the deceased man was the prosecutor in this case. One of the grounds upon which it was sought to justify the cross-examination therefore fails.

It was then said that the cross-examination was admissible in order to ascertain whether the appellant was telling the truth in the story he told to the judge and jury. That seems to me in this particular case to be equivalent to saying that the cross-examination was admissible because it was directed to the credibility of the witness ; in other words the Crown claimed the right, in order to test the truth of the story put forward by the accused person, to cross-examine him as to other transactions which had no relevance to the charge upon which he was being tried. In our opinion that is contrary to the spirit, the intention and even the language of the Criminal Evidence Act, 1898. When Parliament permitted an accused person to go into the witness box and give evidence on his own behalf it expressly provided that he should not be asked any question tending to show that he had committed or been convicted of, or been charged with any offence other than that wherewith he was then charged, or to show that he was of bad character, except on the grounds set out in the Act. It is not alleged that the appellant gave evidence as to his own good character. Another ground set out—namely, that the nature or conduct of the defence was such as to involve imputations on the character of the prosecutor—I have already dealt with, and that ground has failed. We are also of opinion that the cross-examination was not justified on the ground that the defence involved imputations on the character of the witnesses for the prosecution.

We have been pressed by counsel for the Crown with certain observations made by Lord Alverstone C.J. when sitting in this Court in *Rex* v. *Hudson* (1), where he said : "We think that the words of the section, ' unless the nature or conduct of the defence is such as to involve imputations,' etc., must receive their ordinary and natural interpretation, and that it is not legitimate to qualify them by adding or inserting the words 'unnecessarily,' or 'unjustifiably,' or 'for purposes other than that of developing the defence,' or other similar words." We find nothing in those observations inconsistent with the decision we are now giving. The words "for purposes other than that of developing the defence" do not mean the same thing as "for purposes not relevant to the defence." The Court in that case were considering a different question, and in our view were not deciding the point now before us. In the judgment of Lord Alverstone C.J. in *Rex* v. *Hudson* (1) reference is made to the judgment of Channell J. in *Rex* v. *Preston.* (2) In that case Channell J. said: "The latter part of the section is that which it is material to consider in the present case. It appears to us to mean this: that if the defence is so conducted, or the nature of the defence is such, as to involve the proposition that the jury ought not to believe the prosecutor or one of the witnesses for the prosecution upon the ground that his conduct—not his evidence in the case, but his conduct outside the evidence given by him—makes him an unreliable witness, then the jury ought also to know the character of the prisoner who either gives that evidence or makes that charge, and it then becomes admissible to cross-examine the prisoner as to his antecedents and character with the view of shewing that he has such a bad character that the jury ought not to rely upon his evidence." That decision, which was not dissented from in *Rex* v. *Hudson* (3), is in accordance with the view we have just expressed.

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(1) [1912] 2 K. B. 470.

There remains only one further point to be considered—namely, whether this is a case in which the Court should apply the proviso to s. 4 of the Criminal Appeal Act, 1907, and say that in the circumstances there has been no miscarriage of justice. Upon considering all the circumstances however we are unable to say that the jury would have convicted the

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(1) [1912] 2 K. B. 470. (2) [1909] 1 K. B. 575.
(3) [1912] 2 K. B. 464.

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appellant if they had not heard the cross-examination, or even if they had been told to pay no attention to it. If the defence put forward by the appellant—namely, that he killed Gregory in self-defence—was true he was entitled to be acquitted. We are unable to say that the jury might not have taken that view, and therefore we cannot apply s. 4 of the Act of 1907. The conviction for manslaughter must therefore be quashed.

Appeal allowed.

Conviction quashed.

Solicitors for appellant: *Taylor, Stanbury & Co., for Branson & Son, Sheffield.*

Solicitor for Crown: *Director of Public Prosecutions.*

R. F. S.

1919
October 21.

SMITH, Appellant v. PHILPOTT AND PHILPOTT, Respondents.

Adulteration—Milk—Sale to Prejudice of Purchaser—Sample taken on subsequent Day—Evidence—Admissibility—Sale of Food and Drugs Act, 1875 (38 *&* 39 *Vict. c.* 63), *s.* 6.

At the hearing of an information preferred by the appellant against the respondents for having sold milk to the prejudice of the appellant, the purchaser, which was not of the nature, substance and quality demanded by him, justices refused to admit, on behalf of the prosecution, evidence as to an analysis of a sample of milk obtained three days after the date of the alleged offence for the purpose of showing that the milk sold on the day the offence was alleged to have been committed could not have been in the condition in which it came from the cow:—

Held, that the evidence was admissible, but only subject to the conditions pointed out by the Court (and more particularly by Avory J.) in *Wilkinson* v. *Clark* [1916] 2 K. B. 636.

There may be such an interval of time as to make it ridiculous to suggest that a sample taken so long after the date of the offence can have any weight at all, and therefore it may be right to exclude it.

Per Avory J. In the last line on p. 640 of the report in the Law Reports of *Wilkinson* v. *Clark* [1916] 2 K. B. 636 the words "sample of milk" ought to be substituted for the word "milk."

Case stated by justices for the Borough of Ramsgate.

An information was preferred by the appellant Smith against the respondents who traded as "E. and C. Philpott" for that they on May 13, 1919, at Ramsgate (by the hands of one Horton, their servant and agent) unlawfully did sell to the prejudice of the appellant, the purchaser, milk which was deficient in fat or cream to the extent of 26 per cent., and was not of the nature substance and quality demanded by the purchaser, contrary to s. 6 of the Sale of Food and Drugs Act, 1875.

On May 13, 1919, the appellant purchased from the respondents' servant, Horton, a pint of new milk. Upon analysis the milk was found to be deficient in fat or cream to the extent of 26 per cent. The justices found that the milk was sold to the appellant in the same state as yielded by the respondents' cows and that no person had tampered therewith.

On the part of the appellant it was contended that upon the authority of *Wilkinson* v. *Clark* (1) evidence of the analysis of a further sample of milk obtained from the respondents' premises three days after the date of the alleged offence should be admitted to show that on that subsequent day the further sample of milk was of the standard required by the Sale of Milk Regulations, 1901, and that the evidence of the public analyst to the effect that in his opinion no alteration in the feeding of the respondents' cows could have produced in three days this result, should also be received by the justices, and that therefore the deficiency in fat or cream in the milk the subject of the information could not have resulted from natural causes and consequently the milk could not have been sold in the same state as yielded by the cows.

On the part of the respondents it was contended that the evidence was inadmissible on the ground that the facts in the present case differed from those in *Wilkinson* v. *Clark* (1) in that the appellant had not taken the second sample until three days subsequent to the date of the alleged offence, and further that the appellant was not in a position to fulfil the conditions precedent to the admissibility of the evidence set forth more particularly in the judgment of Avory J. in

(1) [1916] 2 K. B. 636.

Wilkinson v. *Clark.* (1) It was further contended that it had been proved that the milk the subject-matter of the information had been sold to the appellant in the same state and condition as yielded by the cows, and that consequently the respondents were entitled to a dismissal upon the authority of *Hunt* v. *Richardson.* (2)

The justices were of opinion that having regard to the last paragraph of the judgment of Low J. in *Wilkinson* v. *Clark* (3) and to the fact that the second sample of milk had not been taken by the appellant until three days after the date of the alleged offence, the present case differed from *Wilkinson* v. *Clark* (1), and consequently that they ought not to admit the evidence as to the second sample tendered by the appellant; and the respondents having proved to the satisfaction of the justices that the milk the subject-matter of the information had in fact been sold as yielded by the cows they therefore dismissed the information.

The question for the opinion of the Court was whether the justices came to a correct determination in point of law.

Thesiger for the appellant. The evidence as to the analysis of the sample obtained from the respondents' premises three days after the alleged offence ought to have been admitted by the justices for the purpose of showing that the milk sold on the day of the alleged offence could not have been in the same state as yielded by the cows. There is nothing in *Wilkinson* v. *Clark* (1) to show that a sample taken three days after the alleged offence is inadmissible in evidence. The question what weight ought to be given to the evidence is for the justices. It is true that the judgments in *Wilkinson* v. *Clark* (1) were carefully safeguarded, but that was for the purpose only of preventing it being thought that the Court was laying down the proposition that the evidence could be given for the purpose of showing that the accused had on the subsequent day committed another offence of the same nature as that which is the subject of the charge.

(1) [1916] 2 K. B. 636. (2) [1916] 2 K. B. 446.
(3) [1916] 2 K. B. 636, 641.

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Roland Oliver for the respondents. It must be admitted that the mere fact that the further sample was not taken till three days after the alleged offence does not make the evidence as to the quality of the sample inadmissible. But, before the evidence can be given, the safeguards laid down by Avory J. and accentuated by Low J. in *Wilkinson* v. *Clark* (1) must be strictly complied with. In the present case there is nothing to show that the conditions precedent were fulfilled.

EARL OF READING C.J. We think this case should be remitted to the justices.

It is quite clear that the decision as it stands, and as we interpret it, is wrong in law. The mere fact that the sample had not been taken till three days after the date of the offence is not sufficient to make the evidence inadmissible in law.

In *Wilkinson* v. *Clark* (1), where the time which expired between the date of the offence and the date of taking the sample for analysis was only one day, we never for a moment intended to limit the principle of law in its operation to a period of one day as compared with a period of three days. All we meant to say was that these cases require to be very carefully safeguarded, and what we had in mind was that there may be such an interval of time as to make it ridiculous to suggest that a sample taken so long after the date of the offence could have any weight at all, and therefore it might be right to exclude it. But on the principle of law the evidence is admissible only subject to the same conditions as were pointed out by us, and, with reference to the taking of the sample, more particularly pointed out by Avory J. in his judgment. We think the case must go back. The evidence is admissible, but it is admissible only if the conditions precedent are fulfilled.

AVORY J. I entirely agree. I wish to add, my attention being called now to the report of *Wilkinson* v. *Clark* in the Law Reports (2), that in the last line on p. 640 the words

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(1) [1916] 2 K. B. 636.

(2) [1916] 2 K. B. 636, 640.

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"sample of milk" ought to be substituted for the word "milk" in my judgment.

SANKEY J. I agree.

Case remitted.

Solicitor for appellant: *Sharpe, Pritchard & Co., for A. Blasdale Clarke, Ramsgate.*

Solicitors for respondents: *Patersons, Snow & Co., for K. & W. Daniel, Ramsgate.*

J. E. A.

1919
October 21.

WELTON, APPELLANT *v.* RUFFLES, RESPONDENT.

Gaming—Playing Ten-pins on licensed Premises—Prize presented by Owners of Premises—Money subscribed by Players—Licensing (Consolidation) Act, 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c.* 24), *s.* 79.

A copper kettle was bowled for on a ten-pin ground forming part of licensed premises of which the appellant was the licence holder and brewers were the owners. The kettle was presented by the brewers, and each person who took part in the bowling paid an entrance fee of 6*d.* for the chance of winning the kettle. The entrance fees were collected at the request of the appellant by one of the players, who paid out of the sum so collected 18*s.* to the appellant, retaining the balance for himself. The appellant, some days after the bowling had taken place, sent the 18*s.* to a hospital. Upon an information against the appellant under s. 79 of the Licensing (Consolidation) Act, 1910, for unlawfully suffering gaming upon his licensed premises, justices found that the brewers were not disinterested persons, and convicted the appellant:—

Held, that the conviction must be upheld.

Lockwood v. *Cooper* [1903] 2 K. B. 428 distinguished.

CASE stated by justices for the County of Suffolk.

An information was preferred under the Licensing (Consolidation) Act, 1910 (1), by the respondent, Ruffles, a superintendent of police of Eye, in the said county, against the appellant, Welton, of Rendham, in the said county, licensed victualler, for that he on June 9, 1919, at the parish of Rendham, then being duly licensed to sell by retail intoxicating liquor in his house and premises there, known as the White Horse Inn, unlawfully did suffer gaming, to wit, the playing of ten-pins by persons there for a copper kettle in consideration of a payment by each person so playing of a sum of money for the chance of winning the kettle, to be carried on on his said premises.

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(1) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 79, sub-s. 1: "The holder of a justices' licence shall not (*a*) suffer any gaming or unlawful game to be carried on on his premises; . . . ."

Sub-s. 2: "If the holder of a justices' licence acts in contravention of this section, he shall be liable in respect of each offence to a fine not exceeding in the case of the first offence ten pounds, and in the case of any subsequent offence twenty pounds."

On Whit-Monday evening, June 9, 1919, a copper kettle was bowled for on the ten-pin ground attached to the appellant's inn, and forming part of the licensed premises of the appellant. The kettle had been presented by the brewers, the owners of the premises, the appellant being the tenant and licence-holder. Sixpence per head was collected from each person who took part in the bowling by one William Whiting, who had been asked by the appellant to collect the money, and something in excess of 18*s*. was so collected, showing that at least thirty-six players took part in the bowling. The 18*s*. was paid to the appellant, and the rest of the money was kept by Whiting, who took part in the bowling. The kettle was won by one of the players who had paid 6*d*. to entitle him to bowl for it.

Before the day on which the bowling took place the appellant had been informed by the police that bowling for money or money's worth was not legal, and on June 16, 1919, he was visited by the police with reference to the bowling for the kettle, and again on June 27, 1919. On the latter date he stated that he had sent the 18*s*. to the East Suffolk and Ipswich Hospital, and the receipt was shown dated June 23, and he admitted that he had told Whiting to keep anything over and above the 18*s*.

The brewers' manager admitted that he had advised the appellant after the first visit of the police after the alleged offence to send the money to the hospital. The appellant, however, stated on oath that he had told Whiting, when collecting the money, to inform the persons entering that the money would be sent to the hospital, and that he sent it on June 21.

On the part of the appellant it was contended that the kettle having been supplied by a third party, and not being provided out of the entrance fees, no offence had been committed.

On the part of the respondent it was contended that the payment of entrance fees showed that the money had been staked, which constituted the offence of suffering gaming to be carried on within the meaning of s. 79 of the Licensing (Consolidation) Act, 1910.

The justices being of opinion (1.) that it was not the intention of the appellant at the time of the commission of the offence to forward the money collected to the hospital, (2.) that although the brewers had presented the kettle to be bowled for, they were not disinterested persons, (3.) that the payment of an entrance fee by the players was for the chance of winning the kettle, and (4.) the retaining part of the money collected by the appellant until after the police were making inquiries and the brewers had advised him to send it to the hospital—i.e., from June 9 to June 21, and (5.) the gift of the rest of the money to one of the players who had collected it, showed that gaming by playing at ten-pins for money or money's worth had been suffered on the premises, convicted the appellant and ordered him to pay a fine of 2*l.* and 2*l.* 5*s.* 6*d.* costs.

The question for the opinion of the Court was whether the justices came to a correct determination in point of law.

D. N. Pritt (*Leighton* with him) for the appellant. It is not unlawful within the meaning of the Licensing (Consolidation) Act, 1910, to play a game of skill and chance not in itself an unlawful game and not being played for stakes but for a prize given by a third person: *Lockwood* v. *Cooper* (1); *Bew* v. *Harston* (2); *Dyson* v. *Mason.* (3) In the present case the 6*d.* paid by each player was an entrance fee, not a stake. A stake must have reference to a prize, and the winner receives

(1) [1903] 2 K. B. 428.
(2) (1878) 3 Q. B. D. 454.
(3) (1889) 22 Q. B. D. 351.

it back. The brewers provided the prize and the sums of 6*d*. paid by each player did not reach the brewers. The winner did not receive back any part of the 6*d*. If the decision of the justices is upheld, the law will be carried further than it has been in any reported case. In all the authorities the stakes have gone directly to the purchase of the prize.

Claughton Scott for the respondent was not called on.

EARL OF READING C.J. In my opinion the justices were right in the conclusion they formed. They convicted the appellant of suffering gaming on licensed premises, and the question depends upon the application of the law to two findings of fact: first, that the players paid an entrance fee for the chance of winning the kettle, and, secondly (which is not so material), that the brewers presented the kettle to be bowled for and were interested persons. The brewers were interested persons because they were the owners of the licensed premises; they were interested apparently in the sale of the beer consumed or sold on the premises; they gave a copper kettle for competition in a game of ten-pins played in a place in the licensed premises; and I entertain no doubt whatever that the sole reason for the selection of this house for the presentation of the copper kettle by the brewers was that they thought it would attract customers to the licensed premises and that consequently more trade would be done. Each of the players had to pay an entrance fee of 6*d*. It is immaterial that the money subscribed was to be paid by the licensee to a hospital. The justices have found as a fact that that was an afterthought of the licensee on the advice of the brewers when it became known that the police had a vigilant eye upon the proceedings on the licensed premises. Whether it was or was not an afterthought is wholly immaterial.

The real question is whether or not the players—that is, the persons who paid their entrance fee—stood the chance of winning or losing. To use the words of Lord Alverstone C.J. in *Lockwood* v. *Cooper* (1): "To amount to gaming the game played must involve an element of wagering—that is to say, each of the players must have a chance of losing as well as of winning." Now, it is clear that all the players could not win; one of the players would win the kettle; all the other players would each lose 6*d*., and the consequence is that there are all the elements of a stake in a game in which each of the players has a chance of winning or losing. When, in addition to that, there is the fact of the brewers' interest in the presentation of the kettle for the purpose of the competition, it makes any doubt impossible. I am not resting my decision upon that particular fact. Taking the findings of the justices numbered (2.) and (3.), disregarding all the others and applying the law to those two findings, the justices were, in my judgment, right in the conclusion at which they arrived that the appellant had committed the offence with which he was charged. I desire only to add that it would be disastrous if we had been forced to come to an opposite conclusion. It would open the door to many ways of evading the law, and consequently the policy of the law (which is to prevent gaming, because it is a means of the attraction of customers to the premises there to indulge in further drinking) would be utterly defeated. Therefore I think the appeal must be dismissed.

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(1) [1903] 2 K. B. 428, 431.

AVORY J. I am of the same opinion. The result of the decisions bearing upon this subject is that playing at any game, either of chance or skill, upon licensed premises for money or money's worth is gaming within the meaning of s. 79 of the Licensing (Consolidation) Act, 1910. In *Dyson* v. *Mason* (1) which is the authoritative decision upon this point it is clear that the argument of Mr. R. S. Wright, afterwards Wright J., for the respondent was adopted by the Court. He put the point quite plainly at the commencement of his argument when he said: "It is admitted that billiards and pool are lawful games; but the playing of any lawful game of skill for money or money's worth is 'gaming' within s. 17" (i.e., s. 17 of the Licensing Act, 1872 (35 & 36 Vict. c. 94), which corresponds to s. 79 of the Licensing (Consolidation) Act, 1910), "and renders the owner of the licensed premises liable to conviction. . . . ." He then referred to *Reg.* v. *Ashton* (1), which has been quoted in subsequent decisions, where Lord Campbell C.J. said: "The object of the statute was to prevent the contracting of bad habits by the practice of games, where money was staked, in public-houses. If money were staked, that would be gaming; and then there might be a lawful conviction for allowing gaming in the house." It is clear that the expression "money was staked" is satisfied if persons are playing for either actual money or money's worth; that is to say, if they stake their money on the chance of winning a prize in the shape of something that is worth money. There are two decisions in which playing this game of ten-pins for beer has been held to be gaming within the meaning of the section corresponding to s. 79 of the Licensing (Consolidation) Act, 1910—namely, *Danford* v. *Taylor* (2), a decision of four judges (Cockburn C.J., Mellor, Lush and Hayes JJ.) and *Luff* v. *Leaper* (3), again a judgment of four judges (Cockburn C.J., Blackburn, Mellor and Quain JJ.). In giving judgment in that case Blackburn J. said: "Even if ginger beer were the stake the prosecution, though well founded, might perhaps be a foolish one, but where beer is the stake it is proper enough to prosecute."

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(1) 22 Q. B. D. 351, 353.

Upon behalf of the appellant it was contended by Mr. Pritt that, having regard to the decision in *Lockwood* v. *Cooper* (4), we ought to hold that, to constitute gaming, the money which is staked by the players must go directly to the prize, either to the purchase of it or must itself be the prize. I cannot accept that distinction. It is sufficient, in my opinion, in a case like the present, if the money which is staked indirectly goes towards the prize. There cannot be a doubt in the present case that it went in directly towards the prize. The brewers would never have presented this kettle as a prize but for the fact that they knew it would encourage persons to come to the house and pay their sixpences for the purpose of playing this game on the chance of winning. I therefore agree that the distinction which, on behalf of the appellant, Mr. Pritt

(1) (1852) 1 E. & B. 286, 289.
(2) (1869) 20 L. T. 483.
(3) (1872) 36 J. P. 773.
(4) [1903] 2 K. B. 428.

asks us to draw is not a sound one, and that the justices, whatever reasons they may have given for their decision, whether good or bad, could properly only come to the conclusion at which they arrived—namely, that there had been a breach of the statute.

SANKEY J. I am of the same opinion. I think one has to remember that this case comes under s. 79, sub-s. 1, of the Licensing (Consolidation) Act, 1910, whereby it is provided that "the holder of a justices' licence shall not—(*a*) suffer any gaming or unlawful game to be carried on on his premises; . . . ." That section re-enacts in substance the corresponding section—s. 17—of the Licensing Act, 1872· Under s. 17 there have been numerous decisions, and it seems to me that it is desirable to state quite briefly the result of and the reasons for those decisions.

The result of the decisions appears to me to be this—that the playing of any lawful game of skill for money or money's worth is gaming, and renders the owner of the licensed premises liable to conviction.

That being the result of the decisions, the reasons for them have been stated by two judges of eminence—in 1852 by Lord Campbell C.J. in *Reg.* v. *Ashton* (1), where he suggests that the Legislature in the Alehouse Act, 1828 (9 Geo. 4, c. 61), had in view that the playing of games for money in public houses was likely to lead to habits of intoxication, and by Wills J. in 1889 in *Dyson* v. *Mason* (2), where he said: "If games, whether of chance or skill, are allowed to be played for money, the tendency is to encourage the spending of money in drink."

Those being, in my opinion, (1.) the result of, and (2.) the reasons for the various decisions, I turn to the findings of the justices in the present case, which have already been alluded to by my Lord—namely, findings (2.) and (3.). Finding (2.) is that the brewers who presented the kettle to be bowled for were not disinterested persons, and finding (3.) is that there was the payment of an entrance fee by the

(1) 1 E. & B. 286.

(2) 22 Q. B. D. 351, 356.

players for the chance of winning the kettle. It appears to me that those two findings bring the present case within the decisions I have referred to.

In *Lockwood* v. *Cooper* (1) the facts were entirely distinguishable from those in the present case. There it was an outside club which took a room at the hotel for the purpose of playing a game of cards known as progressive whist. The club had the exclusive use of the room and was charged weekly for its use. In the report in the Law Journal Reports (2) the facts are stated rather more fully than in the Law Reports, and it appears that the charge included refreshments. In the present case the facts are entirely different. The copper kettle which was bowled for on the ten-pin ground attached to and forming part of the licensed premises of the appellant, the tenant and licence holder, was presented by the brewers, the owners of the premises, and 6*d.* per head was collected from each person taking part in the bowling. That is an entirely different state of facts from those in *Lockwood* v. *Cooper* (3). *Lockwood* v. *Cooper* (3) is, no doubt, an authority upon the particular facts and circumstances appearing therein. Doubtless, in any future case in which similar facts and circumstances occur to those disclosed in *Lockwood* v. *Cooper* (3) that decision will be applied. For these reasons the justices were in my judgment right in convicting.

Appeal dismissed.

Solicitors for appellant: *Field, Roscoe & Co., for Aldous & Gotelee, Ipswich,*

Solicitors for respondent: *Johnson, Weatherall, Sturt & Hardy, for Marshall & Son, Ipswich.*

(1) [1903] 2 K. B. 428.

(2) 72 L. J. (K. B.) 690.

(3) [1903] 2 K. B. 428; 72 L. J. (K. B.) 690.

J. E. A.

1919
October 22.

THE KING *v.* FARNBOROUGH URBAN DISTRICT COUNCIL.

Ex parte THE ALDERSHOT DISTRICT TRACTION COMPANY.

Local Government—Hackney Carriages—Omnibuses—Licence—Refusal by Licensing Authority—Right of Licensing Authority to take Fares into Consideration—Exercise of Discretion—Town Police Clauses Act, 1847 (10 & 11 *Vict. c.* 89), *ss.* 37, 68—*Town Police Clauses Act*, 1889 (52 & 53 *Vict. c.* 14), *ss.* 4, 6—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 171.

By s. 37 of the Town Police Clauses Act, 1847, the local authority has power to license hackney carriages to ply for hire within the prescribed distance; and by s. 68 the local authority has power to make bylaws fixing the rates or fares to be paid for hackney carriages.

By s. 4 of the Town Police Clauses Act, 1889, various sections of the Act of 1847 with regard to the licensing of hackney carriages are made to apply to the licensing of omnibuses; s. 68 of the Act of 1847 giving power to fix rates or fares is however not incorporated. Under s. 6 of the Act of 1889 the local authority has power to make a bylaw to provide for the exhibition on some conspicuous part of every omnibus of a statement in legible letters and figures of the fares to be demanded and received from the persons using or carried for hire in such omnibus:—

Held, that a local authority in considering an application for licences for omnibuses to ply for hire in its district is not entitled to take into consideration the fares charged by the proprietors of the omnibuses, and therefore is not entitled to refuse to grant the licences on the ground that the fares charged are excessive.

RULE NISI for a mandamus calling upon the Farnborough Urban District Council to show cause why they should not appoint a meeting and thereat hear and determine according to law, and pursuant to the statutes in that behalf, the matter of an application by the Aldershot District Traction Co. for the renewal of licences for their omnibuses plying for hire in the Farnborough district.

The rule was moved upon the ground that in considering in May, 1919, the renewal of the licences the Farnborough Urban District Council took into consideration matters relating to the fares charged by the Aldershot District Traction

Co. for certain sections of the routes run in the district, and to the amount of the fares, which by law they had no right to take into account, and that upon those irrelevant matters the Council refused to renew the licences of the omnibuses.

The Aldershot District Traction Co. had for ten years run motor omnibuses from Aldershot to Farnborough and from Farnborough to Camberley and generally in the Aldershot district. The routes from Aldershot to Camberley and from Aldershot to Deepcut passed through the Farnborough Urban District Council's district.

The company in January, 1917, raised two of the fares on the routes passing through the Farnborough district, and discontinued penny stages. The company carried soldiers in uniform at reduced fares by agreement with the military authorities, and they also carried aircraft workers at the same reduced rates as were applicable to soldiers in uniform.

The Farnborough Urban District Council received complaints from residents in the district with reference to the discrimination made between the fares for civilians and those for soldiers in uniform. Negotiations and correspondence with regard to the matter took place between the Council and the company.

The question of the renewal of the licences for the company's omnibuses using the Farnborough district came before a meeting of the Council on May 13, 1919. Ultimately the Council, acting as they said in the interests of the public, refused to renew the licences upon two grounds—namely, the refusal of the company to reduce its fares and its refusal to adopt penny stages.

Holman Gregory K.C. and *E. G. Palmer* for the Farnborough Urban District Council showed cause. Under s. 37 of the Town Police Clauses Act, 1847, which is incorporated by s. 171 of the Public Health Act, 1875, the local authority are given power to license hackney carriages to ply for hire within the prescribed distance. That section is made to apply to omnibuses by s. 4 of the Town Police Clauses Act, 1889. It was the duty of the Council before granting the licences for the

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Traction Co.'s omnibuses to inquire into the terms and conditions upon which it was proposed that the omnibuses should ply for hire and see whether it was advisable in the interests of the public that the omnibuses should run under those conditions. Among the matters which the Council were entitled to take into consideration were the questions as to the fares to be charged and the routes it was proposed that the omnibuses should take. Although the local authority could not make it a condition of the granting of a licence in respect of an omnibus that a certain fare should be charged, yet if when an application for a licence was made the local authority was told that a certain fare would be charged the local authority was entitled to say whether it was advisable in the public interest that the omnibuses should be licensed. The law with regard to the matter was dealt with in *Rex* v. *Brighton Corporation ; Ex parte Thomas Tilling, Ld.* (1) It was there laid down that the local authority must not take extraneous considerations into account. The question of fares is not however an extraneous consideration ; it is a most material circumstance for the local authority to take into consideration in considering whether the licences ought to be granted.

Macmorran K.C. and *Sir Archibald Bodkin* in support of the rule. It is clear from a comparison of the various sections of the Town Police Clauses Acts, 1847 and 1889, that the Legislature has carefully kept the question of fares in the case of omnibuses from the consideration of the local authority. Sect. 4 of the Act of 1889 provides that "the several terms 'hackney carriages,' 'hackney coach,' 'carriages' and 'carriage' whenever used in ss. 37, 40 to 52 (both inclusive), 54, 58, and 60 to 67 (both inclusive) of the principal Act"—namely, that of 1847—"shall, notwithstanding anything contained in s. 38 of that Act, be deemed to include every omnibus." Power is given to the local authority by the Act of 1847 to make bylaws, and by s. 68 it may make bylaws fixing the rates or fares as well for time as distance to be paid for hackney carriages. Sect. 68 is not however one of the sections made applicable to omnibuses. By s. 6 of the Act of 1889 power is given to make a bylaw "to provide for the exhibition on some conspicuous part of every omnibus of a statement in legible letters and figures of the fares to be demanded and received from the persons using or carried for hire in such omnibus." Therefore the distinction between a hackney carriage and an omnibus is that with regard to a hackney carriage the local authority may make bylaws for fixing fares, but with regard to an omnibus the only thing the local authority can do is to provide for the exhibition in the omnibus of a statement of the fares charged. The reason for the difference is that in the case of a hackney carriage plying for hire in a district it is easy to fix the fares, whereas in the case of an omnibus which may traverse two or three districts it is impracticable to have the fares fixed by the local authority. A fair inference to be drawn from the legislation is that it was not intended to give control over the fares of omnibuses to the licensing authority. If the licensing authority have no control over the fares but yet refuse to license omnibuses on the ground that it considers the fare charged to be excessive it is exceeding its jurisdiction. The local authority in considering an application for a licence must consider, as was pointed out by Sankey J. in the *Brighton Corporation Case* (1), not only the interests of the public but also the rights of the persons applying for the licence. The district council have not done that and in the circumstances of the case the rule ought to be made absolute.

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(1) (1916) 85 L. J. (K. B.) 1552.

Earl of Reading C.J. The Aldershot District Traction Co. obtained a rule for a mandamus directed to the Farnborough Urban District Council to show cause why they should not be ordered by this Court to hear and determine according to law the application of the Traction Co. for licences in respect of omnibuses serving the Farnborough district, upon the ground that the Council had taken matters into consideration relating to the fares charged by the Traction Co. for certain sections of the route run in the district, and also to the amount of such

(1) 85 L. J. (K. B.) 1555.

fares. It is contended that the Council had no right to take the fares charged by the Traction Co. into account, and that having done so they arrived at their conclusion upon extraneous considerations, and therefore that they should be ordered now to hear and determine the application according to law.

The substantial question for the consideration of the Court in this case is whether or not the Farnborough Urban District Council in considering the application of the Traction Co. for licences for omnibuses to ply for hire within the district of the Farnborough Council have any jurisdiction to consider the fares charged by the Traction Co. I have come to the conclusion that the Council are not entitled to take the question of the fares charged into consideration, and that the jurisdiction which is conferred upon them of granting licences, and which entitles them to consider all relevant matter, does not justify them in seeking to exercise control over the fares to be charged by the Traction Co. There is a substantial difference between the powers conferred upon the local authority when considering applications for licences for hackney carriages, and when considering applications for licences for omnibuses. Under s. 37 of the Town Police Clauses Act, 1847, the Commissioners may from time to time license hackney carriages to ply for hire within the prescribed distance according to the provisions of the section. Power is also given to the Commissioners under s. 68 of that statute to make bylaws for regulating hackney carriages, which includes the power to fix "the rates or fares, as well for time as distance, to be paid for such hackney carriages within the prescribed distance, and for securing the due publication of such fares." It is important to observe that that power is given only with regard to hackney carriages. By the Town Police Clauses Act, 1889, certain of the provisions relating to hackney carriages under the Town Police Clauses Act, 1847, were made applicable to omnibuses as defined by s. 3 of the Act of 1889. By s. 4 of that Act the term "hackney carriage" in certain sections of the Act of 1847 was deemed to include every omnibus, but it is to be observed that s. 68, which gave the power to make bylaws for regulating and fixing the fares for hackney carriages, is not one of the sections included in s. 4, and therefore is not made applicable to omnibuses plying for hire. By s. 6 of the Act of 1889 power is given to the Commissioners to make bylaws for a number of purposes, including the power to provide for the exhibition on a conspicuous part of the omnibus of a statement in letters and figures of the fares to be demanded and received from the persons using or carried for hire in such omnibus. Now that differs from the powers granted to the authorities under s. 68 of the Act of 1847, to make bylaws for fixing the rates or fares for hackney carriages, and I think Mr. Macmorran's argument upon this point was right and should prevail in this Court. The result of a comparison of those sections is to show that whereas with regard to hackney carriages the licensing authority has power to regulate and fix fares it has not a similar power with reference to omnibuses, but only the power to provide that the fares charged shall be exhibited in a conspicuous part of the omnibus and in a conspicuous manner.

That being the law, is it open to the Council to exercise powers not given to them by the statute by virtue of powers conferred upon them to issue licences? In other words can the Council exercise control over the fares to be charged in the district by refusing to grant the licences on the ground that excessive fares are charged? If they can it is obvious that they would then be controlling fares within the district because the licences for omnibuses must be applied for annually, and they could make it a condition of granting the licences that fares not exceeding certain rates should be charged within the district. It is obvious that this would place the Traction Co. in a considerable difficulty, because if it is open to this licensing authority to impose that condition it must be equally open to every other licensing authority through whose district the Traction Co.'s omnibuses ply for hire to impose similar conditions. I am clear that the power which is given to local authorities to license omnibuses does not carry with it a power to regulate the fares charged to the persons using those omnibuses, which is not given by the statute, and which on comparing the powers given in relation to hackney carriages seems to be excluded from the jurisdiction of the authorities licensing omnibuses.

Having arrived at that conclusion, it seems to me to dispose of this case, because on the facts as shown in the affidavits, and by the arguments that have been addressed to us, it is apparent that the licensing authority has refused these licenses only because it sought to obtain a reduction of the fares charged by the Traction Co. within its district, and that is, in my judgment, travelling outside the jurisdiction which is conferred upon the authorities to license the omnibuses.

It seems to me unnecessary now to consider further whether the Council have properly adjudicated upon the questions raised as to fares, because, as I have already said, I think they had no jurisdiction to make conditions as to fares in granting licences.

For these reasons I think that the rule must be made absolute.

Avory J. I am of the same opinion. Applying the principle of law as laid down by this Court in the case of *Rex* v. *Brighton Corporation* (1), when the Court comes to the conclusion that the local authority have not properly exercised their jurisdiction because they have taken extraneous matters into account and allowed themselves to be influenced by them, it is the duty of this Court to intervene. Applying that principle I have come to the conclusion that the local authority in this case have taken extraneous matters into account—namely, the fares charged by this omnibus company. That they have allowed those matters to influence them is beyond question. The perfectly frank statement which appears in the letter of May 15, 1919, from the clerk to the Council to the managing director of the company, puts that beyond doubt. He there states : " The Council have further considered your application for renewal of licences for the company's omnibuses, and I am desired to express their regret that your company do not see their way to adopt the

(1) 85 L. J. (K. B.) 1552.

Council's suggestions with reference to the reduction of fares and the adoption of penny stages. The Council have unanimously decided that, acting in the interest of the public in this district, they are unable to grant your application for renewals." It is quite clear that the local authority bona fide believed that it had the power to take this question of fares into consideration upon the application for the renewal of the licences. The only question this Court has to determine is whether it had that power. The Lord Chief Justice has called attention to the relevant sections of the Town Police Clauses Acts of 1847 and 1889, and I have nothing to add to what he has said upon them except perhaps to notice that it is significant that s. 4 of the Act of 1889, which incorporates certain sections of the Act of 1847, deliberately stops short in the incorporation at s. 67, and does not incorporate s. 68 of the Act of 1847, which gives power to the local authority, who are there called the Commissioners, to make bylaws for the purpose, among other things, of fixing the fares to be paid for hackney carriages. So that when the Legislature was adapting the Town Police Clauses Act, 1847, to omnibuses in the year 1889 they expressly excluded the power to make bylaws for the regulation of the fares of omnibuses, and the same Act of 1889 in giving power to the local authority, or Commissioners, to make bylaws contemplates that the omnibus proprietors will themselves fix the fares, because it limits the power to make bylaws to a provision for the exhibition on some conspicuous part of the omnibus of a statement of the fares to be demanded. The result, to my mind, is clear that the Legislature intended that the proprietors of the omnibuses should have the power to fix the fares, and that the local authority should not have the power to regulate them. That being so in my opinion the local authority in this case, although acting perfectly bona fide in thinking that it had the right to take the fares charged into consideration, has usurped it. They declined to grant this license unless the company run the omnibuses at certain fares, which the company in effect decline to do. I think the local authority had no right to do that, and therefore the rule must be made absolute.

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SANKEY J. I agree. It seems perfectly clear that the local authority is expressly excluded from the right of fixing the rates or fares to be charged by persons using omnibuses. I have come to the conclusion that it is not entitled to take into consideration the question of fares when an applicant is applying for a licence for omnibuses. That is the result of the sections of the Town Police Clauses Acts of 1847 and 1889 which have been referred to. The reason may well be that indicated by Mr. Macmorran in the course of his argument. When one considers that an omnibus may run through the districts of several urban and rural district councils, as in this particular case, it would be the height of inconvenience to hold that each particular district council could regulate the fares chargeable on the omnibuses in respect of the particular part of the journey which was made through their territory. Mr. Macmorran is right both as to the result of the sections and the reason for that result, and the rule must be made absolute.

Rule absolute.

Solicitors for applicants: *Blyth, Dutton, Hartley and Blyth, for Foster & Wells, Aldershot.*

Solicitors for District Council: *Lees & Co., for J. A. Kingdon, Farnborough.*

R. F. S.

DOBSON, APPELLANT *v.* JENNINGS, RESPONDENT.

1919
October 23.

Highway—Locomotives—Licence—Exemption—Agricultural Locomotive—Locomotive not used for Haulage Purposes—Locomotive intended for Use but not yet used for Agricultural Purposes—Locomotives Act, 1898 (61 *&* 62 *Vict. c.* 29), *ss.* 9, 17.

By s. 9, sub-s. 1, of the Locomotives Act, 1898, "Every locomotive shall be licensed by a County Council, provided that this enactment shall not apply to any agricultural locomotive, to any locomotive not used for haulage purposes . . . . ."

By sub-s. 10, "If any person uses on any highway a locomotive which is required to be, but is not, licensed in accordance with this section" he commits an offence.

By s. 17, "The expression 'agricultural locomotive' includes any locomotive used solely for threshing, ploughing, or any other agricultural purpose."

A locomotive, which had previously been used for haulage purposes, was purchased by a person who intended to use it solely for agricultural purposes. It could not however be used therefor without alteration. The locomotive was driven by the appellant along a highway from the place where it was purchased to the purchaser's premises without being licensed. It was not on that occasion being used for haulage purposes The appellant was convicted of using on a highway a locomotive without being licensed :—

Held, that any locomotive which was actually being used or which was intended by the owner to be used for any of the excepted purposes set out in s. 9, sub-s. 1, of the Locomotives Act, 1898, did not require to be licensed under that section, and that therefore the appellant had been wrongly convicted.

CASE stated by justices for the county of Somerset.

An information was preferred by the respondent, William Jennings, a county police superintendent, against the appellant, Robert Dobson, under s. 9, sub-s. 10, of the Locomotives Act, 1898 (1), for having on January 2, 1919, at the parish of Keynsham in the county of Somerset unlawfully used on the highway a locomotive which was not licensed by a county council.

Upon the hearing of the information on February 7, 1919, the following facts were admitted or proved :—

(*a*) On January 2, 1919, in the parish of Keynsham in the county of Somerset the said locomotive was being driven along the road by the appellant. The locomotive was the property of John Dobson, of Littlecott Mill, Enford, Pewsey, in the county of Wilts, the father of the appellant.

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(1) The sections are set out in the headnote.

(*b*) The locomotive was not licensed or registered by the Somerset County Council or any other council.

(*c*) The locomotive had been purchased about December 20, 1918, by John Dobson, and on the occasion in question the appellant was driving it from the place where it had been purchased to the mill of John Dobson. On the occasion in question the locomotive was not being used for haulage purposes, and it was stated that John Dobson intended to use it for threshing and ploughing purposes only and not for haulage.

(*d*) The locomotive had before being purchased by John Dobson not been used for agricultural purposes. It could be used for haulage purposes.

On the part of the appellant it was contended that the locomotive was not being used for haulage purposes, nor was it intended to be used for such purposes, but was intended to be used as an agricultural locomotive for the sole purpose of threshing and ploughing, and was therefore exempt from the necessity for a licence under s. 9, sub-s. 1, of the Locomotives Act, 1898. (1)

On the part of the respondent it was contended that as the locomotive was one that was capable of being used for haulage purposes it could not be lawfully used on the highway without being first licensed or registered.

The justices were of opinion that the respondent's contention was right, and that the offence as charged against the appellant had been committed by him, and they accordingly convicted him.

The question for the opinion of the Court was whether upon the above statement of facts the justices came to a correct determination in point of law.

The Divisional Court on May 15, 1919, ordered that the case should be remitted to the justices to be restated by showing whether the locomotive came within any, and if so which of the excepted clauses, and if necessary to hear further evidence.

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(1) The sections are set out in the headnote.

In the additional case the justices stated that the following further facts were admitted or proved in evidence :—

(*a*) The locomotive was purchased in December, 1918, by John Dobson from Mrs. Esther Prewell of Stapleton Road, Bristol, steam roundabout proprietress, who and her deceased husband and family had used it for several years for hauling roundabout properties and other hauling and for no other purpose.

(*b*) The locomotive at the time of purchase was not fit for any purpose without repair.

(*c*) John Dobson had for many years been an agricultural engine proprietor and also a repairer of locomotives ; he also dealt in them, buying, repairing and selling them again. He had done no haulage except agricultural.

(*d*) The appellant repaired the engine sufficiently to travel.

(*e*) The appellant in reply to a police constable stated that he intended to use it for threshing and ploughing ; it could not be used for the latter purpose without alteration.

(*f*) The locomotive had not been used since it was purchased by John Dobson except for agricultural purposes.

The justices stated that the locomotive was not in their opinion on the day on which the appellant was summoned being used for any excepted purpose, and therefore did not come within any of the excepted clauses.

Charles K.C. and *Sir H. Cassie Holden* for the appellant. The decision of the justices that the locomotive in question did not come within any of the exceptions in s. 9 of the Locomotives Act, 1898, was wrong. There is a definite finding in the first case that on the occasion in question the locomotive was not being used for haulage purposes, and therefore it came within the exception in s. 9 of any locomotive not used for haulage purposes. If the conviction stands no farmer who buys a locomotive for agricultural purposes can take it home along the road to his farm without taking out a licence. Further, a farmer may have two farms and may wish to take the locomotive along the road from one farm to the other, or even from one part of a farm to another part of the same farm, but if this decision is correct he will commit an offence unless the locomotive is licensed. It was held in *Ellis & Co.* v. *Hulse* (1) that a locomotive used for carrying straw and manure to be used exclusively on farms, and which was not used for any other purpose, was a locomotive used solely for agricultural purposes, and therefore came within the exemption. The Court in that case came to that conclusion notwithstanding that the machine was capable of being used for other than agricultural purposes because it was not in fact so used. The fact that the locomotive in the present case had previously been used solely for haulage purposes is immaterial. The test is the user to which the present owner of the locomotive intended to put it. The case finds that that was solely for agricultural purposes.

Simey for the respondent. The justices were right in holding that an offence had been committed having regard to the facts as stated in the case and supplemental case. The justices had merely to consider the status of the locomotive on January 2, 1919, when the offence was alleged to have been committed, whether on that day it was a locomotive used for agricultural purposes or for haulage purposes. Before December 20, 1918, the locomotive had been used solely for haulage purposes, and there was no evidence before the justices that its status had been altered before January 2, 1919. The justices have found that the status of the locomotive had not been altered and that therefore it could not be used on the highway without being licensed. The offence created by s. 9, sub-s. 10, of the Locomotives Act, 1898, is the user on a highway of a locomotive which is required to be, but is not, licensed. The mere intention of the owner as to subsequent user is not sufficient to bring a locomotive within the exemption. The words "not used for haulage purposes" in s. 9 are part of the definition of the locomotives which are exempted; they do not mean that the locomotive must actually be used on the particular day for haulage purposes in order to require a licence; the words do not refer to the user of the locomotive on the particular day at all; they refer to the status of the locomotive according to its previous general user. A farmer who buys an engine which

(1) (1889) 23 Q. B. D. 24.

has previously been used solely for haulage purposes but which he intends to use for agricultural purposes commits an offence if he brings it home along the highway without obtaining a licence.

EARL OF READING C.J. In my judgment this appeal must be allowed. The question is whether the appellant had committed an offence under s. 9, sub-s. 10, of the Locomotives Act, 1898, by using on a highway a locomotive which was not licensed. The Act provides in s. 9, sub-s. 1, that "every locomotive shall be licensed by a County Council, provided that this enactment shall not apply to any agricultural locomotive, to any locomotive not used for haulage purposes," with certain other exceptions to which I need not refer. The question is whether the exemptions in sub-s. 1 of s. 9 apply to the use by the appellant of this locomotive on the highway. As far as the facts are material it appears that the locomotive had previously been used for hauling roundabout properties. It had been a locomotive used for haulage purposes. It was then purchased by the appellant's father. According to the evidence, when he purchased it he meant to use it for threshing or ploughing or any other agricultural purpose within the meaning of the Act. If the locomotive had then been in a condition to be used for agricultural purposes there is no doubt that the appellant did not commit any offence on January 2, but on that date the locomotive had only been repaired so that it was able to travel along the road; it had not yet been repaired sufficiently, or altered adequately, to be used for threshing or ploughing or any other agricultural purpose. It is therefore said that the offence had been committed because the appellant was using on the highway a locomotive which was not licensed and which was used for haulage. That is because it had been previously used for haulage purposes. Now the justices at first came to the conclusion that "used for haulage purposes" means capable of being used for haulage purposes, and that if a locomotive was capable of being used for haulage purposes it did not come within the exemptions. That is doing violence to the language of the section, and it is quite clear that that decision was wrong. That is the view that this Court formed when the case was before it on the first occasion. The case then went back to the justices to state further facts. On the facts as now stated by the justices they say that the locomotive did not come within any of the excepted purposes. I think they are wrong. In my opinion the locomotive did come within the excepted purposes. The reason why the justices arrived at a wrong conclusion is because they have read the words "to any agricultural locomotive, to any locomotive not used for haulage purposes," as if that were a matter which depended upon the use to which the locomotive could be put at the time, or was actually being put at the time, without any regard to the purpose for which it was intended to be used by the person who was the owner, and therefore, although the appellant was driving the locomotive along the highway with the intention of using it for agricultural purposes only and not intending to use it for haulage purposes, the justices held that he had committed an offence, because he had driven the locomotive along the highway without a licence. I do not think that the justices could have fully appreciated what the effect of their decision would be. It would mean that if a farmer, for whom the exemption with regard to agricultural locomotives has been enacted, buys a locomotive and takes it along a highway with the intention of using it only for agricultural purposes after he has made an alteration in it, he committs an offence unless he has actually taken out a licence so as to enable him to take the locomotive along the road from the place where he has purchased it to the place where he will use it for his farming. I think that result was never intended by the Legislature. but that the section really means that the enactment shall not apply to any locomotive which is actually used or which is intended to be used for any of the excepted purposes by the person who is responsible for it. Applying that test in the present case it is clear that no offence has been committed. Consequently the appeal must be allowed and the conviction quashed.

AVORY J. I agree. Mr. Simey admits that the conviction

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cannot be supported on the ground on which the justices purported to act when the case was first stated for the consideration of this Court—namely, that as the locomotive was capable of being used for haulage purposes it could not be used on the highway without being licensed, and that the appellant was therefore liable. It appears to me that the justices have on the second occasion also proceeded upon a wrong ground, because they find that the locomotive was not in their opinion on the day on which the appellant was summoned being used for any excepted purpose, and therefore did not come within any of the exemptions. I think that that is too narrow a view to take of this section and that they have overlooked the fact that s. 9, sub-s. 1, provides for two separate exceptions, (1.) the agricultural locomotive, and (2.) the locomotive which is not used for haulage purposes. In my opinion, for the reasons given by the Lord Chief Justice, it is clear that this was a locomotive not used for haulage purposes in the sense that it was not going to be used for haulage purposes, and was not in fact being used for haulage purposes at the time in respect of which the appellant was summoned. Therefore I agree the conviction should be quashed.

SANKEY J. I am of the same opinion.

Appeal allowed.
Conviction quashed.

Solicitors for appellant: *Joynson-Hicks & Co.*

Solicitors for respondent: *Maude & Tunnicliffe*, for *G. I. Simey, Weston-super-Mare.*

R. F. S.

1919
October 29.

HAYES *v.* BROWN.

County Court—Practice—Admission of "documents"—Plan prepared for Purpose of Illustration—Absence of Notice to admit—Costs of proving—County Court Rules, Order XVIII., *r.* 6 ; *Order* LIII., *r.* 44.

A plan made for the purpose of illustration, such as a plan of the scene of an accident prepared for the purposes of the trial, is not a "document" within the meaning of Order XVIII., r. 6,' of the County Court Rules, and need not be included in a notice to admit documents.

APPEAL from the Marylebone County Court on a motion to review taxation.

The action was for damages for the loss of a horse killed by the negligent driving of the defendant's motor car in the Finchley Road. For the purposes of the trial the plaintiff's solicitors employed a surveyor to prepare a plan of the locus in quo. That plan was not included in the plaintiff's notice to admit. A subpœna was served by the plaintiff upon the surveyor to attend at the hearing and prove the plan. The surveyor duly attended. The judge gave judgment for the plaintiff and allowed the costs of the plan. On taxation the registrar allowed the plaintiff the costs of the subpœna and of the surveyor's attendance. The defendant carried in objections to such allowance on the ground that no notice to admit the plan had been given, and that consequently, by reason of Order XVIII., r. 6, no costs of proving it could be allowed. The registrar adhered to his decision, and on motion to review the taxation, the county court judge affirmed him. The defendant appealed.

J. B. Matthews K.C. and *David White* for the defendant. By Order XVIII., r. 6, of the County Court Rules : "Where a party desires to give in evidence any document" he may give notice to the other party to inspect and admit it, and "no costs of proving any document shall be allowed unless such notice has been given." A plan of the scene of an accident prepared for the purposes of trial is a "document" within that rule. It is common practice amongst legal text writers to classify plans under the head of documents. Of this we have an illustration in Taylor on Evidence in §§ 658–661, dealing with the admissibility of ancient documents coming from the proper custody. The term " document " is there treated as including maps and plans. So, too, in § 1600, which deals with the proof of public documents by examined or certified copies. In § 1770 B it is said that a tithe map is admissible as a public document. In Stephen's Digest of the Law of Evidence it is said that statements of facts in published maps or charts are irrelevant if they relate to matters not likely to be accurately stated "in such documents." In Bray on Discovery, at p. 208, under the head of " Production of Documents," the question is dealt with whether certain documents such as plans or sketches of an estate made by stewards of manors or land agents for their own use in performing their duties are the property of the principal or agent.

Martin O'Connor and *M. O'Sullivan* for the plaintiff were not called upon.

LUSH J. In this case, which was a running-down case, the plaintiff's solicitors instructed a surveyor to prepare a plan of the locus in quo. That plan was not included in the plaintiff's notice to admit documents. The surveyor who prepared it was served with a subpœna to attend at the trial and prove the plan, and he attended in due course, though, as the plan was then admitted by the defendant, it became unnecessary to call him. The judge gave judgment for the plaintiff, and allowed the cost of the plan. On taxation the defendant objected to being charged with the costs of serving the subpœna upon the surveyor and of his attendance at the trial, upon the ground that the plan had not been included in the plaintiff's notice to admit. The registrar overruled the defendant's objection, and on motion to review the judge affirmed his decision. The defendant now appeals to this Court. The objection is raised under Order XVIII., r. 6, of the County Court Rules, which says that " Where a party desires to give in evidence any document " he may give notice to any other party to admit it, and if such other party does not admit it

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any expense of proving it shall be paid by him unless the Court otherwise orders, "and no costs of proving any document shall be allowed unless such notice has been given." It is contended that the plan was a "document" within the meaning of that rule, and that as no notice was given to admit it the costs of proving it could not be allowed. In my opinion that contention is not sound. Order XVIII., r. 6, only applies to documents which a party "desires to give in evidence," and a plan like this which is intended, not as evidence of any facts, but merely to illustrate the party's case, is not such a document. A plan of that kind is dealt with by a different rule—Order LIII., r. 44—which provides that "Persons who prepare plans . . . . for the purpose of illustration, and who if called at the trial prove the correctness of such plans . . . . only, shall not be entitled to allowances as expert and scientific witnesses, but shall be allowed for their attendance upon the scale applicable to ordinary witnesses." I do not say that no plan can be a document within Order XVIII., r. 6. There are many plans which are documents in the nature of evidence. But the question is whether this particular plan which was prepared only for the purpose of illustrating the plaintiff's case is such a document. I think it is not. It stands on the same footing as a photograph used for the purpose of identifying a person or place. The appeal must be dismissed.

SANKEY J. I agree. The question is not whether all plans are documents within Order XVIII., r. 6, but whether this particular plan was so. I think it was not, but came within Order LIII., r. 44. It was not an evidential document but was only illustrative.

Appeal dismissed.

Solicitors for defendant: *White & Co.*
Solicitors for plaintiff: *Appleton & Co.*

J. F. C.

KEMP, Appellant *v.* LUBBOCK, Respondent.

1919
October 21.

London—Hackney Carriage—Motor Cab fitted with Taximeter—Fare payable—Extra Person—" Child "—Infant in Arms—London Hackney Carriage Act, 1853 (16 *&* 17 *Vict. c.* 33)*—Metropolitan Public Carriage Act,* 1869 (32 *&* 33 *Vict. c.* 115)*—London Cab and Stage Carriage Act,* 1907 (7 *Edw.* 7, *c.* 55)*—Statutory Rules and Orders,* 1917, *No.* 426, *Sched. K.*

An infant in arms is not a " child " within the meaning of Sched. K to the Statutory Order No. 426, dated May 1, 1917, made by the Secretary of State in pursuance of the Metropolitan Carriage Act, 1869, and the London Cab and Stage Carriage Act, 1907, and therefore need not be paid for as an extra person.

Case stated by a metropolitan magistrate.

A complaint was preferred by the appellant, William Henry Kemp, under the London Hackney Carriage Act, 1853, against the respondent, Irene Lubbock, for having, on May 5, 1919, unlawfully refused to pay the fare provided under Sched. K of the Home Secretary's Order of May 1, 1917. (1)

The appellant was a duly licensed Hackney carriage driver, and he drove the respondent, together with her nurse and child, from Maida Vale to Paddington, being a distance of less than one mile, in a motor-cab fitted with a taximeter. The child was an infant in arms, eighteen months old, and was carried throughout the journey in the arms of the nurse. The taxi-meter registered 8*d.* at the end of the journey. The respondent paid to the appellant 1*s.* 6*d.*, being 8*d.* for the fare, 6*d.* extra under an order of the Home Secretary made on October 23, 1917, and 4*d.* as a gratuity.

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(1) Statutory Rules and Orders, 1917, No. 426. Order, dated May 1, 1917, made by the Secretary of State in pursuance of the Metropolitan Carriage Act, 1869 (32 & 33 Vict. c. 115), and the London Cab and Stage Carriage Act, 1907 (7 Edw. 7, c. 55):

SCHEDULE K.

" The fare payable for the hiring of a motor cab, fitted with a taximeter recording the fare by a combination of time and distance, shall be according to the following scale:—

" (*a*) For a distance not exceeding one mile, or for time not exceeding ten minutes .. .. .. 8*d*.

. . . . . .

" In addition to the above, the driver may be entitled to charge the following extra payments:—

. . . .

" (2.) Extra persons:
When licensed to carry more than two persons—
For each additional person beyond two for the whole journey .. 6*d*.

" Provided that one child, or if there be more than one, two children under the age of ten years shall count as one person."

The appellant claimed 1*s.* 8*d.*—namely, 6*d.* for the child in addition to the 8*d.* and the 6*d.* above-mentioned. He contended that he was entitled to charge for the child as an additional person under Sched. K of the Home Secretary's order dated May 1, 1917, and that the word "child" in the order included an infant in arms, however young, as there was no provision in the Hackney Carriage Acts that children under three years of age should be carried free of charge as under the Railway Regulation Act, 1844 (7 & 8 Vict. c. 85), s. 6, and the Cheap Trains Act, 1883 (46 & 47 Vict. c. 34), s. 5.

The respondent contended that upon the facts the appellant was not entitled to recover the sum claimed, as there was a custom that infants in arms should not be charged for either in omnibuses, tramcars, or Hackney carriages.

The magistrate was of opinion that the custom existed, and that the appellant was not entitled to make a charge for the child as an additional person.

The question for the opinion of the Court was whether the magistrate came to a correct determination in point of law.

Turrell for the appellant. An infant in arms eighteen months old is an extra person within the meaning of the order of May 1, 1917. One child under ten years of age is to count as one person and two children each under that age are also to count as one person. An extra fare of 6*d.* must therefore be paid for the infant. Under the Act relating to Hackney Coaches passed in 1815 (55 Geo. 3, c. 159) it was expressly provided by s. 3 that children in arms should not be paid for; also in the Railway Passenger Duty Act, 1842 (5 & 6 Vict. c. 79), s. 13, the proviso expressly enacts that "no child under five years of age, sitting in the lap, shall be deemed a passenger within the meaning of this Act." Those statutes show that when the Legislature intends that infants in arms shall not be paid for it expressly so enacts.

The order divides humanity into two classes, one class over ten years of age and the other younger than ten years of age. The infant in arms is therefore included in the proviso in Sched. K relating to a child under ten years of age. An unborn child would not be a "person" within the meaning of the order, and would, therefore, not have to be paid for, but a living child is a "person."

Giveen for the respondent. A Hansom cab is licensed to carry two persons only, and therefore if an infant in arms is an "extra person" a married woman travelling with her husband in a Hansom and carrying an infant would commit an offence.

[He was stopped.]

EARL OF READING C.J. In my opinion the magistrate was right. The sole question is whether an infant in arms is to be paid for as a "person" under the order of May 1, 1917, issued by the Home Office. It is quite clear that the provision is with regard to a child or two children, and if the word "child" in the order is intended to cover and include an infant in arms, Mr. Turrell's argument on behalf of the appellant is right. If on the other hand it is not so intended, the argument fails. I think it is not.

Whether any particular child is properly described as an infant in arms is a question of fact for the magistrate. In the present case the magistrate has found that the child was an infant in arms, and consequently in my view, being an infant in arms, it is not a child to be reckoned as a person for whom the extra payment is to be made. It is a simple question of interpretation. It would lead to an absurdity if the word "child" in this order were construed as including an infant in arms. It would have to receive the same construction in other regulations, and it would be absurd to say that a woman carrying an infant in arms in a Hansom cab must pay for two persons, and that if another child accompanied her there would be an infringement of the regulations. I am quite clear that the word "child" was not intended to cover an infant in arms, and therefore the appeal will be dismissed.

AVORY J. I agree. The proper construction of the word "child" in this order is that it does not include an infant in arms, and when one looks at the object and purpose of the regulations it is to my mind clear that the object was to provide that a person who occupies an extra seat in the conveyance shall be paid for. The presumption is that an infant in arms does not occupy any seat or space in the conveyance. Therefore I agree that the magistrate was right.

SANKEY J. I agree.

Appeal dismissed.

Solicitors for appellant: *Gamlin & Thomas.*
Solicitors for respondent: *Rubinstein, Nash & Co.*

J. E. A.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

K. B. D.
1919
May 7, 8.

C. A.
1919
Oct. 17, 20.

In re AN ARBITRATION BETWEEN HOOLEY HILL RUBBER AND CHEMICAL COMPANY, LIMITED, AND ROYAL INSURANCE COMPANY, LIMITED, AND OTHERS.

Insurance (Fire)—Policy—Exception—Explosion—Fire causing Explosion—Representation as to Effect of Policy—Fact or Law—Estoppel.

Manufacturers of explosives insured their buildings and the contents thereof by policies of insurance whereby the insurers agreed to pay the sums named if the property or any part thereof should be destroyed or damaged by fire. Each policy contained a condition to the effect that the insurance did not cover loss or damage by explosion, except explosion of illuminating gas, and a memorandum indorsed in these words: "This policy does not cover loss or damage by explosion nor loss or damage by fire following any explosion unless it be proved that such a fire was not caused directly or indirectly thereby or was not the result thereof."

A fire broke out at the works of the manufacturers. After much damage had been done, a quantity of tri-nitro-toluol exposed to the heat of the fire exploded and destroyed the buildings and their contents:—

Held, by Bailhache J. and by the Court of Appeal that as to the damage caused by the explosion the insurers were exempted from liability by the condition and memorandum, although the explosion occurred in the course of a fire.

Stanley v. *Western Insurance Co.* (1868) L. R. 3 Ex. 71 approved and followed.

During negotiations between the manufacturers and an agent of an insurance company for the issue of a fire policy the manufacturers asked the agent whether the company's ordinary fire policy covered damage done by an explosion following a fire. The agent in reply quoted the terms of the condition mentioned above and informed the manufacturers that damage caused by an explosion resulting from a fire would be covered by the company's ordinary fire policy save that loss or damage as specified in the condition would be excepted. The manufacturers understood the qualification to refer only to an explosion due to hostile action, "loss or damage occasioned by foreign enemy" being one of the excepted risks in the condition.

Held, by Bailhache J., that the representation by the agent was a representation, not of fact, but of law—namely, as to the meaning and effect of the condition—and that therefore the insurance company when sued on the policy was not estopped from contending by way of defence that the loss was caused by an explosion.

1919

HOOLEY HILL RUBBER AND CHEMICAL CO. AND ROYAL INSURANCE CO., *In re.*

AWARD in an arbitration stated in the form of a special case.

Differences having arisen between the Hooley Hill Rubber and Chemical Co., Ld. (hereinafter called "the assured") and the Royal Insurance Co., Ld., and three other insurance companies (hereinafter called "the insurance companies") in respect of the liability of the insurance companies for a claim made against them by the assured under certain policies of insurance, these differences were referred to Mr. A. M. Langdon K.C., as sole arbitrator, who stated his award in the form of this special case.

At all material times the assured carried on business as manufacturers of an explosive, tri-nitro-toluol, at Ashton-under-Lyne, on premises which they had built and adapted for that purpose.

The assured had taken out policies of insurance by which the insurance companies agreed to pay specified amounts if the property or any part thereof should be destroyed or damaged by fire. Condition 3 of the policy of the Royal Insurance Co. provided :—

"This policy does not cover . . . . loss or damage occasioned by or in consequence of invasion, foreign enemy, rebellion, insurrection, riot, civil commotion, or any military or usurped power whatsoever, earthquake, volcano or subterranean fire, nor loss or damage by explosion, except loss or damage caused by explosion of illuminating gas elsewhere than on premises in which gas is manufactured or stored."

The other companies' policies contained a similar condition. The condition in each case is hereinafter referred to as condition 3. There was also the following typewritten memorandum indorsed on each of the policies :—

"This policy does not cover loss or damage by explosion nor loss or damage by fire following any explosion unless it be proved that such a fire was not caused, directly or indirectly, thereby or was not the result thereof."

On June 13, 1917, during the currency of the policies, a fire broke out in the works of the assured. It burnt fiercely, doing great damage, for some twenty minutes. Then an explosion took place which shattered the premises. The explosion occurred by reason that a quantity of tri-nitro-toluol contained in closed receptacles was exposed to the intense heat of the fire. It is common knowledge that under these conditions tri-nitro-toluol is certain to explode.

The arbitrator assessed the loss sustained by the assured up to the time of the explosion at the sum of 12,740*l.* The loss sustained by the assured in consequence of the fire and the explosion together amounted to a sum far in excess of the aggregate amount of the sums insured by the policies.

The insurance companies admitted liability to indemnify the assured for the loss in consequence of the fire, but denied liability for the loss consequent upon the explosion on the ground that condition 3 and the memorandum indorsed on the policies excepted them from that liability.

The assured contended that under the policies they were entitled to be indemnified, not only in respect of the loss caused by the fire, but also in respect of the loss caused by the explosion, on the ground that the explosion was an incident in the course of the fire, which was the proximate cause of the whole loss.

The arbitrator directed himself on the authority of *Stanley* v. *Western Insurance Co.* (1) that he was bound to find that the contention of the insurance companies was well founded, and that the contention of the assured could not prevail.

A further contention was advanced by the assured—namely, that the Royal Insurance Co. were estopped from denying that they were liable under their policy to indemnify the assured against the loss which arose from the explosion.

Upon this point the arbitrator arrived at the following conclusions of fact and law :—

In 1915 the assured were organizing their factory for the manufacture of tri-nitro-toluol, and were negotiating with the Royal Insurance Co. as to the insurance to be effected, and in particular as to the sum to be insured and the kind of risks to be covered. The negotiations were conducted by correspondence with the manager of a sub-branch of the Royal Insurance Co. There were no interviews between the parties. Early in 1915 the assured had obtained from the Royal Insurance Co. a cover against the risk of fire subject to the usual conditions of their policies, until the policy was prepared. On September 27, 1915, the assured wrote to the manager asking whether they were covered by ordinary fire insurance should an incendiary bomb, or any bomb, be dropped on their works and cause an outbreak of fire. The manager wrote in reply on September 28 that the position might be most clearly shown by quoting condition 3 on the company's policy, and he set out in his letter the terms of condition 3. On reading that letter the assured were desirous of determining their position in case an explosion followed a fire and contributed to the damage done by the fire. Accordingly on October 12 the assured wrote to the manager asking whether in that event they would be covered by ordinary fire insurance for that damage, and on October 13 the manager replied as follows: "In reply to your enquiry, we have pleasure in advising that damage caused by an explosion resulting from a fire would be duly covered by an ordinary fire policy, with the qualification of course that loss or damage as specified in condition 3 of our policies (quoted in our letter of the 28th ulto.) would still be excepted." By that letter the agent intended to inform the assured as to the legal effect of the policies to be issued in due course by the Royal Insurance Co. The assured understood the letter as a notification that they were in fact covered against loss caused by an explosion following a fire, other than an explosion due to enemy action, and they were in fact induced by the letter to limit their insurance against loss caused by an explosion following a fire to the policies about to be issued by the Royal Insurance Co. Consequently the assured did not cover themselves by taking out a further policy against loss of that kind. The statements in the letter of October 13 were repeated in a further letter from the manager dated December 23, 1915. Cover notes were from time to time sent by the Royal Insurance Co. to the assured, and on March 1,

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(1) L. R. 3 Ex. 71.

1916, the policies were received by the assured and retained without question. The assured were well aware that an outbreak of fire in a factory for the making of tri-nitro-toluol is almost certain to cause an explosion, if the fire attacks receptacles in which the explosive is enclosed. These receptacles in one form or another are a necessary part of the plant required in the manufacture of the explosive.

The arbitrator directed himself in law that the letters of October 13 and December 23 were observations of an officer of the Royal Insurance Co. during the negotiations of the policies as to the legal effect of the policies about to be issued, and that, therefore, no estoppel arose against the company to prevent them from relying upon the true meaning of the policies legally construed. He awarded that the insurance companies should severally pay the assured the following sums—namely, the Royal Insurance Co. to pay 5096*l.*, and each of the other three companies 2548*l.*, making a total of 12,740*l.*

Douglas Hogg K.C. and *McCleary* for the assured. The first question is whether the exception in the policies of loss or damage by explosion is an exception which exempts the companies from liability for damage caused by an explosion which occurs in the course of a fire. Where there is both a fire and an explosion, if the proximate cause of the loss is the fire, and the explosion is only incidental to the fire, the exception clause does not apply. On the other hand if there is an explosion followed by a fire, the companies would be protected. *Stanley* v. *Western Insurance Co.* (1) is distinguishable on the facts, for in that case the explosion was the proximate cause of the damage and loss, whereas in the present case the fire was the proximate cause. The damage done by the explosion was just as much a consequence of the fire as would be damage caused by water in attempting to extinguish a fire or by the intentional destruction of a neighbouring house by explosion for the purpose of checking the progress of the flames.

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(1) L. R. 3 Ex. 71.

The second question is whether the Royal Insurance Co. are estopped by the statements in the manager's letters from relying on the exception. The statements were a representation of fact—namely, that the assured was protected by the company's policy against damage by explosion, unless caused by enemy action. It was not a question of the legal construction or meaning of the policy, for the assured had not at that time seen the policy, and the reference to condition 3 was given in order to show that loss by enemy action was excepted. [*West London Commercial Bank* v. *Kitson* (1) was referred to.]

R. A. Wright K.C. and *Keogh* for the insurance companies were called upon to argue the second question only. To give rise to an estoppel there must be a representation as to an existing fact. The only representations here were as to the legal effect of the company's policy, the material clause of which was before the assured at the time, and when they subsequently received the policy it was retained without comment. A misrepresentation as to a point of law cannot give rise to an estoppel, assuming the parties to be on an equal footing: *Beattie* v. *Lord Ebury*. (2)

McCleary replied.

BAILHACHE J. This case raises two questions for the opinion of the Court. The first question is whether the insurance companies are liable under their policies for the damage caused by the explosion. [The learned judge read condition 3 and the memorandum indorsed on the policies.] In my opinion the case is indistinguishable from *Stanley* v. *Western Insurance Co.* (3), which was decided fifty years ago and which is binding on me. Upon the authority of that case I hold that the insurance companies are right in saying that their policies do not cover the loss caused by the explosion in the circumstances of this case. The second question, which affects the Royal Insurance Company only, is whether the company are by reason of certain representations made by their manager estopped from denying that their policy covers the loss which happened. In order to ascertain whether there is an estoppel I have to consider the letters which passed between the assured and the company's manager. [The learned judge read the letters set out above and continued :] Now, what meaning would those letters convey to an ordinary intelligent business man ? I think they would convey the impression that such a loss as in fact happened was covered by the ordinary form of policy. It is true that the assured are referred to condition 3, but having regard to the earlier letters and to the fact that they were referred to that clause when asking about an incendiary bomb, I think an ordinary business man would understand the letters to mean that he was covered if a fire occurred which caused an explosion, but that he was not covered if the explosion was due to an incendiary bomb. If that is the meaning of the letters or is the sense in which they ought to be understood, does that create an estoppel ? If the statement was a statement of an existing fact, independent of any question of construction of a written document which would be a question of law, or partly of law and partly of fact, I think there would be an estoppel. But in my judgment, though the matter does not seem to me to be free from doubt, the writer of the letters was putting a construction upon the ordinary form of his company's policy and he was telling the assured that in his opinion the policy did cover such an explosion as occurred in this case. If he had merely said that the ordinary form of policy did cover it, and had not referred to condition 3, I should have had even more doubt about the matter. But while expressing his opinion about it, and saying that as a matter of construction the assured were covered, he referred them to the very clause which, according to the construction placed upon it in *Stanley* v. *Western Insurance Co.* (1), does not cover the loss in question. I think the true position is that the writer was not stating a positive existing fact, but that he was giving his view as to the meaning of a policy which contained this particular clause. His view was a mistaken one, but the assured accepted it as accurate, and

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(1) (1884) 13 Q. B. D. 360.

(2) (1872) L. R. 7 Ch. 777.

(3) L. R. 3 Ex. 71.

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(1) L. R. 3 Ex. 71.

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indeed if it were not for *Stanley's Case* (1) I think there would be a good deal to be said in support of that view. I think that the arbitrator was right in holding that there was no estoppel. The award therefore will stand. I express no opinion as to whether the assured could successfully claim rectification of the policy.

Award upheld.

F. O. R.

Oct. 17. The assured appealed.

[The question of estoppel was not raised in this appeal, the assured and the Royal Insurance Company having come to terms upon that matter.]

Hogg K.C. and *McCleary* for the appellants. It is a general rule in the law of insurance that an ambiguous clause in a policy is to be construed against rather than in favour of the insurers: *In re Etherington and Lancashire and Yorkshire Accident Insurance Co.* (2); *In re Bradley and Essex and Suffolk Accident Indemnity Society.* (3) They must not leave the question of their liability in doubt. They prepare the form of the policy. If they fail to protect themselves by their exceptions in clear terms they must make good the loss. In the present case, apart from condition 3 and the memorandum, the respondents would be liable. The property was destroyed by fire. Condition 3 and the memorandum except from the risk loss or damage by explosion. The result is that if the loss or damage was caused by fire the respondents are liable; if they were caused by explosion the respondents are exempt from liability. The tribunal in such cases has to discover the proximate cause of the loss, bearing in mind that the proximate cause does not mean that which is nearest in point of time to the disaster, but means the real, or efficient, or dominant cause of the loss: *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society.* (4) In this case the fire was the real, efficient, or dominant cause: "The proximate cause is the efficient cause—the one that

(1) L. R. 3 Ex. 71.
(2) [1909] 1 K. B. 591.
(3) [1912] 1 K. B. 415.
(4) [1918] A. C. 350.

necessarily sets the other causes in operation": *Washburn* v. *Farmers' Insurance Co.* (1), citing *Insurance Co.* v. *Boon.* (2) At the least fire was equally with explosion the cause of the loss, and that is enough to entitle the appellants to recover: *Reischer* v. *Borwick.* (3) There are four possible cases: (1.) fire without explosion, which is plainly within the policies; (2.) explosion without fire, which is plainly within the exception; (3.) fire following explosion, which is dealt with by the memorandum; (4.) explosion following fire, which is not specially dealt with, but which is within the policy because the loss or damage was the result of a fire. Bailhache J. felt himself bound by *Stanley* v. *Western Insurance Co.* (4) The decision in that case is unsatisfactory and ought to be overruled. The judgment of Kelly C.B. is inconsistent. The Chief Baron agrees that if, with a view to checking a fire, a neighbouring house were destroyed intentionally by explosion, the damage done by the explosion would be recoverable under the policy in that case, and that, "in a word, every loss that clearly and proximately results, whether directly or indirectly, from the fire, is within the policy." If that damage was within the policy, a fortiori damage by explosion occurring in the course of a fire was within the policy. Yet the Chief Baron held that this damage was within the exception. This decision has not found favour in America: *Transatlantic Fire Insurance Co.* v. *Dorsey* (5); *Washburn* v. *Farmers' Insurance Co.* (1); *Renshaw* v. *Missouri State Mutual Fire and Marine Insurance Co.* (6) The proximate cause is often the earliest in point of time. In *Etherington's Case* (7) an accident policy was effected against bodily injury caused by violent, accidental, external and visible means, and it was provided that the policy only insured against death where accident within the meaning of the policy was the direct or proximate cause thereof, but not where the direct or proximate cause thereof was disease even though aggravated by the accident. The assured met with an accident, developed

(1) (1880) 2 Fed. Rep. 304.
(2) (1877) 95 U. S. 117, 130.
(3) [1894] 2 Q. B. 548.
(4) L. R. 3 Ex. 71.
(5) (1880) 40 Amer. 403.
(6) (1890) 23 Amer. St. Rep. 904.
(7) [1909] 1 K. B. 591.

pneumonia, and died. It was held that the accident was the proximate cause of death. In *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society* (1) a ship was insured against perils of the sea, but the policy was warranted free from all consequences of hostilities. The ship was torpedoed by a German submarine. She was brought to Havre disabled and moored in the outer harbour, where, after taking the ground at every low tide, she became a total loss. It was held that hostilities, and not perils of the sea, were the proximate cause of the loss. In the present case the explosion was not a new cause intervening. The real cause of the loss or damage was the fire. If it is not clearly shown that the real cause was the explosion the appellants are entitled to recover.

Sir John Simon K.C., *R. A. Wright K.C.*, and *Keogh* for the respondents. The effect of excepted warranties in a policy of insurance has to be considered in this case. The respondents admit that, but for the exceptions, loss by explosion in the course of a fire would be covered by these policies. On the same principle in *Cory* v. *Burr* (2) the seizure by the Spanish Government would have been covered by the policy in that case against barratry of the master, which led to the seizure; and in *Lawrence* v. *Accidental Insurance Co.* (3) a policy against accidents was held to cover death by an accident which happened to the assured while in a fit. On the other hand loss by explosion independent of fire would not be within the purview of the policy at all. Then what is the meaning of the exception in condition 3: "This policy does not cover . . . . loss or damage by explosion"? The intention is to exclude such loss by explosion as would be within the policy but for the exception; that is to say loss or damage by explosion caused by or causing a fire. The memorandum makes this clearer by providing that where fire follows an explosion the insurers are not to be liable unless the assured proves that the fire was not caused by the explosion, and by leaving unqualified the exception of loss by explosion caused by a fire.

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(1) [1918] A. C. 350.
(2) (1883) 8 App. Cas. 393.
(3) (1881) 7 Q. B. D. 216.

Moreover the explosion, and not the fire, was the real cause of the loss. In *Livie* v. *Janson* (1) a ship was insured against perils of the sea warranted free from American condemnation. She met with a sea peril which enabled the American Government to capture and subsequently condemn her; and it was held that the underwriters were not liable. So in *Cory* v. *Burr* (2) the ship was insured against barratry warranted free from capture and seizure. She was seized by the Spanish Government for an act of barratry by the master; but it was again held that the underwriters were not liable. In *Lawrence* v. *Accidental Insurance Co.* (3) the policy insured against accidents but did not insure "in case of death arising from fits." The assured being seized with a fit fell from a railway platform and was killed by an engine. It was held that the insurers were liable. *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society* (4) does not help the appellants. There the injury from the war risk continued active and operative until the total loss of the ship. No new cause intervened in that case, as it did in this, to nullify the effect of the first injury. The same is true of *Etherington's Case* (5), pneumonia being one of the well-recognized ways by which an accident and consequent exposure to the weather lead to a fatal end. Of the American cases only one, *Washburn* v. *Farmers' Insurance Co.* (6), purports to be a decision, and that was merely a direction to a jury at nisi prius. The others contain dicta but no decision. *Stanley* v. *Western Insurance Co.* (7) is consonant with English authorities; it has stood unquestioned for fifty years, and ought to be followed.

They were stopped.

BANKES L.J. The appellants were during the war manufacturing explosives at Ryecroft, Ashton-under-Lyne. With the intention of insuring themselves against loss or damage by fire they entered into contracts with various insurance

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(1) (1810) 12 East, 648.
(2) 8 App. Cas. 393.
(3) 7 Q. B. D. 216.
(4) [1918] A. C. 350.
(5) [1909] 1 K. B. 591.
(6) 2 Fed. Rep. 304.
(7) L. R. 3 Ex. 71.

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companies including the Royal Insurance Co. Each company had its own form of policy and conditions, but on the particular point before us there was no material difference in the language of these instruments. Early in the second year of the insurance the amount of the premium was altered and a memorandum was indorsed on the policies in the same terms in each case relating to the liability of the companies in case of an explosion occurring at the appellants' works. The memorandum was intended to be supplementary to the conditions in the policies which already dealt with the case of explosion. During that year a very disastrous fire broke out, followed by an explosion which had the effect of putting out the fire but in itself did immense damage to the assured property. The companies admit liability for the damage done by the fire before the explosion, but they contend that by the terms of their policies they are exempt from liability for damage resulting from the explosion, and the question is whether the companies' contention is well founded.

The argument for the appellants is that the contract between the parties is a contract of insurance, a contract of indemnity against loss by fire; and that for ascertaining whether a particular loss has been caused by a risk insured against the general rule is that the proximate, effective, or efficient cause or, as it was called in *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society* (1), the dominant cause, is to be sought for; and that the fire which brought about the explosion was plainly the proximate, effective or dominant cause of the loss in this case. On the other side this general rule is not disputed, but another general principle is invoked, namely, that the parties may exclude the operation of a general rule in any particular case, and that in this particular case the general rule has been excluded in express and unambiguous language. The point to be decided is whether this contention of the insurance companies is or is not correct. In considering this question it must be borne in mind that these contracts of insurance were entered into by parties contemplating damage to property by fire, and that the introduction of any

(1) [1918] A. C. 350.

reference to explosion shows that they contemplated an explosion following on or causing a fire. An explosion without any antecedent or consequent fire does not seem to have been in the contemplation of the parties at all. The policy as originally drawn excluded loss or damage from explosion in these terms: "This policy does not cover . . . . loss or damage by explosion, except loss or damage caused by explosion of illuminating gas. . . . ." The exception of one particular kind of explosion from the general exclusion of explosions shows that the parties intended to exclude from the risks covered by the policy all kinds of explosion other than the one expressly excepted. This general exclusion of explosions, although altered, is not cancelled by the memorandum indorsed on each of the policies, which provides that "this policy does not cover loss or damage by explosion nor loss or damage by fire following any explosion unless it be proved that such a fire was not caused directly or indirectly thereby. . . . ." That memorandum shows even more plainly that the parties were contemplating and intending to exclude all classes of explosion as sources of loss or damage, and even fire following an explosion, unless the fire is proved not to have been caused directly or indirectly by an explosion. If the question had to be decided for the first time on the terms of the original policy including condition 3 but without the aid of the memorandum I should have been prepared to hold that the insurance companies were right in contending that a loss following on an explosion is not covered by the policies. But the matter is not free from authority. *Stanley* v. *Western Insurance Co.* (1) has been referred to. That case was considered by the arbitrator and the learned judge as a direct authority binding upon them. Mr. Hogg has asked this Court to say that case was wrongly decided, and he referred to a number of cases which seem to show that in America his view has been accepted. It is a salutary rule that the Courts should be chary in interfering with the interpretation given to a well-known document and acted on for any considerable period of time. The decision in *Stanley* v. *Western*

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(1) L. R. 3 Ex. 71, 74, 75.

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Insurance Co. (1) has been unchallenged and presumably acted on for fifty years, and even if I did not agree with the view there expressed I should hesitate before overruling it. I need not criticize it however, because I agree with what was said by Kelly C.B. and Martin B. The policy in that case contained a clause not materially differing from condition 3 in the present case. The assured argued that by virtue of that clause the company were not to be liable for any loss arising from explosion, provided the explosion was not occasioned by a fire already in existence upon the premises; but that if there were already a fire upon the premises, so that the explosion was incidental to and occasioned by the fire and then increased the loss by lending itself to further the fire, the whole damage caused was within the insurance of the policy. Dealing with that argument, the Lord Chief Baron said: "To give the instrument this construction would be, in fact, to introduce into it words not found there; while the natural construction of the words gives a probable and easily intelligible sense. In consequence of the widespread and highly mischievous effects of explosions, the policy excludes liability for any of their consequences. If there be a fire, in the course of which an explosion occurs, for the result of the fire, unconnected with the explosion, the defendants make themselves liable, but not for any of the consequences of that explosion." Referring to the words "Neither will the company be responsible for loss or damage by explosion, except for such loss or damage as shall arise from explosion by gas," Martin B. said: "They are to be construed according to their natural meaning, and as ordinarily understood by mankind. There is nothing to qualify the word 'explosion,' and I apprehend, therefore, that the company bargain, and the insured agrees with them, that they are not to be responsible for any loss or damage by explosion." The judgment of the Lord Chief Baron has been criticized because in a passage later than that which I have read he refers to damage resulting from efforts to put out the fire, for example by water, or efforts to save furniture by throwing it out of the window or to check the progress of the fire even by "the destroying of a neighbouring house by an explosion," as being within the policy. Mr. Hogg contended that the Chief Baron could not consistently with that view hold that an explosion caused by the fire itself was not within the policy. In my opinion the criticism is not sound; but it is not necessary to consider whether all the examples of damage given by the Chief Baron would be within the policy. I agree with his view as to the general exclusion of explosion. The decision in *Stanley* v. *Western Insurance Co.* (1) was right, and ought to be followed, and this appeal must be dismissed.

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(1) L. R. 3 Ex. 71, 74, 75.

SCRUTTON L.J. I am of the same opinion. A fire broke out on the appellants' premises where they were manufacturing tri-nitro-toluol. The fire by its heat caused such an explosion of the tri-nitro-toluol as to blow out the fire and extinguish the factory. The question is whether the terms of a particular policy entitle the appellants to recover the damage done by the explosion. The policy is not in its original form. During the first year of its currency in circumstances which we are not told, but which we can easily surmise remembering the number of munition factories that sprang up during the war, a special memorandum was indorsed on the policy. The policy in its original form insured the appellants from loss or damage "if the property shall be destroyed by fire." There is no express English decision whether by force of those words damage not directly caused by fire, but necessarily consequent on the fire, is recoverable; for example, damage from an explosion caused by a fire, or damage done by roofs and heavy beams or girders which fall in consequence of the fire where damage is done by the fall and not by the fire itself, though the fall is caused by the fire or by efforts made to extinguish it. For though in the last edition of Bunyon's Law of Fire Insurance, 6th ed. (1913), pp. 155, 156, a passage is cited purporting to be the opinion of Kelly C.B. that increased damage caused by the ignition of explosive substances must be made good, the passage is really part

(1) L. R. 3 Ex. 71.

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of the argument for the plaintiff who failed. It is not necessary to decide the point, though I incline to the view that the damage mentioned above would be within this policy if there were no exceptions. To see what damage, prima facie covered by the policy, is excepted from the insurance, a printed condition relating to explosions and an added memorandum have to be considered. Fifty years ago it was submitted, as a possible construction of a similar clause excepting loss or damage arising from explosion, that it only shut out explosions where there was no antecedent fire. That was Mr. Quain's argument in *Stanley* v. *Western Insurance Co.* (1) The Court of Exchequer decided against it. The result is that for fifty years there has been authority in England for construing condition 3 of this policy as excluding loss or damage from an explosion although it is the consequence of an antecedent fire. I feel bound to read the words of the condition in the light of existing English decisions. It would take a very strong case to induce me to give to the words a meaning different from that given to them by an English decision unquestioned for fifty years. I am not impressed by the fact that a different view has been taken by American Courts on American policies. Those Courts frequently differ from ours on the construction of mercantile documents. English Courts construe documents by the light of English decisions. In my view the loss or damage in this case was excluded by the effect of condition 3.

But the case does not stop at the printed conditions. The effect of the memorandum has still to be considered. I agree that the memorandum contemplates four cases of fire with or without an explosion; first, fire without explosion. Clearly the memorandum has nothing to do with that. Secondly, explosion without fire. It seems clear that this (unless it were a gas explosion) would not be within the policy. Thirdly, explosion followed by fire; as to that the memorandum says that the policy does not cover loss caused by the fire unless it be proved that the fire was not caused directly or indirectly by the explosion, or was not the result thereof. The effect of this is that, where damage is done by an explosion and fire following it, the assured cannot recover unless he can prove that the fire was not caused by the explosion. This case is specifically dealt with by the last part of the memorandum. Fourthly, fire followed by explosion. This case is not within the latter part of the memorandum. It is dealt with separately in the earlier part of these words: "This policy does not cover loss or damage by explosion." I do not think those words were inserted to except loss from explosion where there was no fire, which prima facie would not be within the policy at all and would need no exception. In my view the intention was to except loss from an explosion following and caused by a fire and to repeat the decision in *Stanley* v. *Western Insurance Co.* (1) I appreciate the point that a policy against fire in a factory for high explosives is not of much use if it does not cover loss or damage by explosion. That however is a matter between the assured and their insurers. It ought not of itself to outweigh the other considerations I have mentioned. I agree that the appeal should be dismissed.

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(1) L. R. 3 Ex. 71.

DUKE L.J. I agree. The immediate cause of the damage in this case was an explosion through which the premises themselves and the fire which had broken out in them ceased to exist at the same time. The assured claim to recover because, as they say, the effective cause of the damage was the fire. It is not necessary to say what the result would have been if the case had rested on the words on the face of the policy or on those words together with the condition 3. The original position of the parties was modified by a memorandum the terms of which we have to consider. The memorandum provided that the policy should not cover loss or damage by explosion, nor loss or damage by fire following an explosion unless it were proved that, to put it shortly, the fire was independent of the explosion. What is the effect of excluding one of several kinds of damage which insurers might otherwise be bound to make good? I take it to be

(1) L. R. 3 Ex. 71.

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elementary that an exception such as this is an exception of something which would be in the policy if it had not been excepted. The intention then is to exclude loss by explosion which but for the exclusion would or might have involved the insurers in liability. Now, there are two classes of explosion which occur to the mind at once: (1.) those mentioned in condition 3, that is to say, explosions which occur in the course of a fire, and (2.) explosions which cause a fire. The exception deals with something more than explosions which cause a fire. It deals in its first words with loss or damage caused by explosion in the most general terms, and that must be such loss or damage caused by explosion as but for the exception would have been within the effective words of the policy. It must therefore be loss or damage caused by an explosion occurring in connection with fire. An explosion independent of fire would not be within the policy at all. The two classes of explosion are separately dealt with. In the present case there was an explosion in the course of a fire, and it seems to me that the parties have agreed in express and comprehensive terms that damage caused by such an explosion shall not be within the terms of the policy. In this investigation I am glad to have the guidance of *Stanley* v. *Western Insurance Co.* (1) The arguments which prevail with me are those which prevailed with the Court of Exchequer in that case. In my view it was rightly decided. The arguments which influenced the Court must lead us to the same conclusion. I cannot adopt the suggestion that there is in this policy any ambiguous language to be construed contra proferentes.

With regard to the American cases, great respect is due to the opinion of every judge who applies his mind to a system of law analogous to our own and in many cases identical with it. But on some questions of mercantile law English and American decisions have diverged. We cannot say and it is unnecessary to inquire how this question may be treated by the Supreme Court of the United States. We have a clear decision in accordance with principles of con-

(1) L. R. 3 Ex. 71.

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struction and administration of English law which leads me to the conclusion that the learned judge was right and that this appeal should be dismissed.

Appeal dismissed.

Solicitors for appellants: *Vizard, Oldham & Co., for Hockin, Becton & Hockin, Manchester.*

Solicitors for respondents: *Alfred Bright & Sons, for Batesons, Warr & Wimshurst, Liverpool; Paines, Blyth & Huxtable, for Wightman, Pedder & Co., Liverpool.*

W. H. G.

[IN THE COURT OF APPEAL.]

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FLETCHER & SON *v.* JUBB, BOOTH & HELLIWELL.

[1918 F. 53.]

HALIFAX DISTRICT REGISTRY.

Solicitor and Client—Negligence—Instructions to make Claim—Period of Limitation—Allowing Time to run—Public Authorities Protection Act, 1893 (56 *&* 57 *Vict. c.* 61), *s.* 1.

A solicitor instructed by a client to make a claim against a corporation for a neglect or default in the execution of a public duty or authority is bound to know the provisions of s. 1 of the Public Authorities Protection Act, 1893, and to bear them in mind at all material times, and to inform his client if the period is running out during which an action may be commenced. If he loses sight, and allows his client to lose sight, of the provisions of that section so that the claim is barred, the solicitor is guilty of negligence.

Judgment of A. T. Lawrence J. reversed.

Appeal from the judgment of A. T. Lawrence J.

The action was brought by the plaintiffs, a firm of carriers, against the defendants to recover damages for negligence in the conduct of an action brought by the plaintiffs against the Bradford Corporation in which the defendants acted as the plaintiffs' solicitors.

On September 11, 1916, a collision occurred on the Huddersfield Road near Bradford between a tramcar of the Bradford Corporation and a waggon of the plaintiffs containing certain goods the property of the Wheatley Chemical Co. The collision occurred through the negligence of the driver of the tramcar in the service of the corporation. The waggon, horse and driver of the plaintiffs were injured and so were the goods of the Wheatley Chemical Co.

On September 12 the defendants wrote to the corporation: "We have been consulted by Messrs. C. Fletcher & Son of this town (Halifax), carriers, respecting the damage done to their driver, horse, waggon and contents by the negligence of the driver of tramcar No. 212 from Wyke to Bradford yesterday afternoon. It is impossible to estimate the damage, but particulars will be forwarded in due course." On September 19 the defendants wrote: "We have since received instructions on behalf of the Wheatley Chemical Co. . . . . to apply to you for 10*l*. 17*s*. 3*d*. . . . . being the damage sustained by them in the accident which occurred . . . , on the 11th inst. owing to the negligence of the driver of tramcar No. 212. . . . ." On September 28 the town clerk of Bradford wrote to the defendants that the corporation were prepared to compensate the chemical company for the loss sustained by them in the accident, and that the only question was as to the amount of damage sustained. On September 28 the defendants wrote to the town clerk asking if the corporation were prepared to do anything with regard to the plaintiffs' claim and saying that they had instructions to commence proceedings unless some satisfactory settlement was come to. On October 9 the town clerk offered 10*l*. in settlement of the Wheatley Chemical Co.'s claim, and on October 20 that sum, together with 2*l*. 2*s*. for the defendants' costs, was paid by the corporation and accepted by the company in settlement.

In the meantime several letters passed between the defendants and the corporation with reference to the plaintiffs' claim, and on November 20 the town clerk wrote offering to pay 20*l*. in settlement of this claim. On November 21 the defendants wrote to the plaintiffs: "We enclose copy letter which we have to-day received from the town clerk of Bradford, and await your instructions." The plaintiffs never answered this letter.

On March 10, 1917, the defendants wrote to the plaintiffs: "Yourselves *v.* Bradford Corporation. Please let us know if you have settled your claim against the above corporation and if so upon what terms." The plaintiffs did not answer this letter.

On April 12, 1917, the defendants wrote to the town clerk:—"Fletcher & Son *v.* The Corporation. Owing to the upset caused by the war this matter has been neglected, but our client now wishes to have it settled and instructs us to claim 75*l.* for the damage he has incurred to his horse, loss of profit, damage, and loss of gear, etc." The town clerk replied on April 16: "I have submitted your letter of the 12th inst. to my Claims Sub-Committee to-day, and they express surprise at the amount which your clients now claim, viz., 75*l.* You will remember that I wrote to you on November 20 last offering 20*l.* in settlement of the claim, and the sub-committee consider that the offer was a fair one in the circumstances. If you will let me have details showing how the sum of 75*l.* is made up, I will submit the same to the sub-committee at their next meeting, though I am not in a position to state whether the sub-committee are disposed to do anything further in the matter." The defendants sent particulars of the claim amounting to 71*l.* 9*s.* 9*d.* After further correspondence, on June 11, 1917, the town clerk wrote to the defendants: "I have submitted your letter of the 8th inst. to the tramways claims sub-committee to-day, and am instructed to inform you that they are not disposed to pay more than 20*l.* in settlement of your clients' claim, this sum being the amount offered in my letter of November 20 last. If the offer in question is not accepted before Saturday of this week it will be withdrawn."

On July 21, 1917, the defendants entered a plaint in the Bradford County Court on behalf of the plaintiffs claiming a sum which was subsequently agreed at 48*l.* 14*s.* 9*d.* against the Bradford Corporation. The corporation gave notice of a special defence that the claim for which they were summoned

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was barred by a statute of limitations, namely, the Public Authorities Protection Act, 1893. The action was heard in the Bradford County Court. The county court judge held that the plaintiffs' claim was barred by the statute and gave judgment for the corporation.

The plaintiffs then brought this action against the defendants alleging negligence on their part in not taking proceedings against the Bradford Corporation until July 21, by which time the plaintiffs' claim against the corporation was barred.

The case was heard at the Leeds Assizes in May, 1919, by A. T. Lawrence J. without a jury. The learned judge held that the defendants had not been guilty of negligence, having been misled into thinking that the Bradford Corporation had admitted liability in the plaintiffs' case as they had in the case of the Wheatley Chemical Co. He therefore gave judgment for the defendants.

The plaintiffs appealed.

Waugh K.C. and *Harold Newell* for the appellants.

Mitchell-Innes K.C. and *Whately* for the respondents.

The arguments of counsel sufficiently appear in the judgments.

BANKES L.J. This is an appeal from A. T. Lawrence J. in an action tried before the learned judge without a jury. Mr. Mitchell-Innes rightly contends that we ought not to disturb the judgment unless we are sure it is wrong. Now I differ with much reluctance from the opinion of so experienced a judge, but I am satisfied that he took too charitable a view of the solicitors' conduct in this case. The appellants were the owners of a horse and cart which were injured by a collision with a tramcar of the Bradford Corporation on September 11, 1916. The appellants alleged that their horse and cart were damaged by the negligence of the corporation's servant, and that they had a claim for damages against the corporation. This claim would be barred unless an action were brought on or before March 10, 1917. On September 12, 1916, the appellants went to the respondents and instructed them as their solicitors to negotiate with the corporation and endeavour to come to a settlement and, failing that, to commence proceedings. The appellants' cart contained goods belonging to a chemical company for damage to which the company made a claim. The appellants' driver also made a claim for personal injuries. The corporation took up the position that they could not dispute the negligence of their servant; but they did dispute the amount of the damage; and so there was every possibility and probability that the dispute would end in litigation.

Now solicitors are under an obligation to bring to the discharge of their duty as solicitors reasonable care and skill and knowledge of the practice of the Court whose process they invoke on behalf of a client. A solicitor, as was said by Tindal C.J. in *Godefroy* v. *Dalton* (1),“ is liable for the consequences of ignorance or non-observance of the rules of practice of this Court; for the want of care in the preparation of the cause for trial; or of attendance thereon with his witnesses: and for the mismanagement of so much of the conduct of a cause as is usually and ordinarily allotted to his department of the profession. Whilst on the other hand, he is not answerable for error in judgment upon points of new occurrence, or of nice or doubtful construction, or of such as are usually intrusted to men in the higher branch of the profession of the law.” The respondents were certainly under an obligation to know the provisions of the Public Authorities Protection Act, 1893, s. 1, and to bear them in mind at every material stage of the proceedings. On November 20 the corporation made an offer of 20*l.* The respondents passed this offer on to their clients, saying at the same time that they awaited their instructions. The respondents certainly did not think the corporation were going to admit the whole claim, or that the offer was one to be accepted as a matter of course. They expected instructions from the appellants. They heard nothing until after the time had expired within which an action could be brought. What was the respondents' duty ? Being bound to keep in mind the provisions of the statute, and believing as they did that they were still acting as the appellants' solicitors, they were under a duty to intimate to their clients that they must make up their minds to act on or before March 10 if they desired to assert their rights in a Court of law. The respondents did nothing. Their excuse for this inactivity is founded first on the attitude of the corporation, and secondly on the attitude of the appellants. As to the corporation, it cannot be said that they were intimating more than that they were not likely to dispute liability for the accident; there was nothing to suggest that they were not going to dispute the amount to which the appellants might be entitled. But unless the conduct of the corporation was such as to preclude question on both these points, it was possible that the appellants would be obliged to bring an action. Therefore I cannot agree with A. T. Lawrence J. in his view that the respondents' representative was so misled that it would be unfair to find that he was negligent. I cannot see anything in the conduct of the corporation justifying the respondents in omitting to warn their clients that unless they brought their action on or before March 10 it would be barred.

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(1) (1830) 6 Bing. 460, 468.

Then as to the conduct of the appellants themselves. It is true that they were remiss in not answering the respondents' letter of November 21 asking for instructions. But it is also clear that the respondents did not on this account consider that they had discharged their whole duty to their clients in relation to the claim against the corporation, because on March 10, 1917, they wrote to the appellants as their solicitors on this very matter. In my opinion they cannot rely on their clients' conduct as justifying them in doing nothing until it was too late. The appeal must be allowed, and judgment must be entered for the appellants for 48*l.* 14*s.* 9*d.*

SCRUTTON L.J. I share to the full the reluctance of Bankes L.J. in differing from the judgment of A. T. Lawrence J. I also admit the presumption that the judgment is right, and that we should not differ from it unless we are clearly satisfied that it was wrong. And moreover I accept the opinion of Tindal C.J. in *Godefroy* v. *Dalton* (1) that it would be extremely difficult to define the

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(1) 6 Bing. 460.

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exact limit by which the skill and diligence which a solicitor undertakes to furnish in the conduct of a case is bounded, or to trace precisely the dividing line between that reasonable skill and diligence which appears to satisfy his undertaking, and that crassa negligentia, or lata culpa mentioned in some of the cases, for which he is undoubtedly responsible. It is a question of degree and there is a borderland within which it is difficult to say whether a breach of duty has or has not been committed. In cases within that region of doubt this Court would not overrule the judgment of the Court below. But this is not one of those cases.

Now it is not the duty of a solicitor to know the contents of every statute of the realm. But there are some statutes which it is his duty to know; and in these days when the defendants in so many actions are public authorities the Public Authorities Protection Act, 1893, is one of those statutes. The appellants instructed the respondents to make a claim and, if necessary, to bring an action against the Bradford Corporation for damage done by one of the tramcars of the corporation. The respondents wrote and for some time continued writing to the corporation. It is well known that public authorities are willing to avoid litigation if they can settle claims upon reasonable terms, and equally well known that they do not admit claims which they regard as unreasonable; and in the correspondence which took place between the corporation and the respondents I cannot find any admission of liability to the claim the appellants were making. What is the duty of a solicitor who is retained to institute an action which will be barred by statute if not commenced in six months? His first duty is to be aware of the statute. His next is to inform his client of the position. The corporation made an offer to settle this claim; the solicitors sent on the offer to their clients, and they made no answer. The time of limitation was running out. The clients did not know this and they were not warned by the solicitors. One would expect that as the time drew near the solicitors would tell them that if they did not bring an action their claim would be barred. Instead of that they wrote on March 10, the day on which the time expired, to ask if the claim had been settled and if so upon what terms. I cannot understand how they came to write that letter except on the footing that they were still the legal advisers of the appellants. It is urged on their behalf that they were by the conduct of the corporation misled into thinking that the claim had been settled; but I cannot accept that suggestion; they knew that the corporation were investigating the amount of the claim. The period of limitation was one of those matters which the respondents as the appellants' legal advisers ought to have borne in mind. It was negligence not to bear it in mind. For these reasons I agree that the appeal should be allowed.

DUKE L.J. I feel the same reluctance as my brethren in differing from the learned judge, but as I have a clear view I am bound to express it. The respondents being retained to settle or prosecute a claim were bound to exercise reasonable care and diligence in protecting the interests of their clients. The Bradford Corporation were making inquiries and were probably ready to meet any reasonable claim. They made an offer of 20*l.* which the respondents communicated to their clients, who however made no reply. Four months elapsed. Then on March 10, the day on which the time for taking proceedings expired, they wrote recognizing that they were still the appellants' solicitors. Had they discharged their obligation to the appellants? It is said that they were misled by the conduct of the corporation; that they were satisfied that the corporation would pay. If they had reasonable ground for supposing that their client was safeguarded, the words of Lord Cottenham L.C. in *Hart* v. *Frame* (1) might have been invoked in their favour: "Professional men, possessed of a reasonable portion of information and skill, according to the duties they undertake to perform, and exercising what they so possess with reasonable care and diligence in the affairs of their employers, certainly ought not to be held liable for errors in judgment, whether in matters of law or discretion." That means matters of law which are usually left to the other branch of the legal profession. Here there was no ground for supposing that the position of the appellants was safeguarded. It was left to rest on the corporation's sense of propriety. That was a position to which no client ought to be brought without his own consent. The duty of the solicitors was not discharged when they communicated to their clients the offer of the corporation and got no reply. It was their duty to know the provisions of the Public Authorities Protection Act, 1893, s. 1, and to apply their knowledge; to lose sight of the statute was to fail in that degree of care and skill to which the client is entitled. If they had written warning the appellants that the period of limitation was running out and that if they were meditating legal proceedings they should give instructions at once, that might have satisfied their obligation to their clients; but as it was the solicitors lost sight and the clients were allowed to lose sight of the provisions of the statute. I agree that the appeal should be allowed.

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(1) (1839) 6 Cl. & F. 193, 210.

Appeal allowed.

Solicitors for appellants: *Van Sandau & Co., for C. H. Marshall, Huddersfield.*

Solicitors for respondents: *Helliwell, Harby & Evershed, for W. H. Boocock & Son, Halifax.*

W. H. G.

[IN THE COURT OF APPEAL.]

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HILLMAN *v.* LONDON, BRIGHTON & SOUTH COAST RAILWAY COMPANY.

Employer and Workman—Injury by Accident—Compensation—Failure to make Claim within Six Months—"Reasonable cause"—Question of Fact or Law—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 2.

On January 31, 1917, the applicant, while in the employ of the respondent railway company, sustained a rupture. He reported the accident to an official of the company, who told him to get first aid, which he did, and was supplied with a truss. He continued to work for the company, though not doing his usual heavy work, for which he was incapacitated, and the company paid him his full wages until April 5, 1919, when he was discharged. He then made a claim for compensation under the Act, and his application was refused by the county court judge on the ground that the claim had not been made within six months from the occurrence of the accident, and that the failure to make a claim was not occasioned by "reasonable cause" within s. 2 (1.) (*b*). The workman appealed:—

Held, that the function of the arbitrator in such a case was to find the facts, and then to direct himself, as matter of law, whether those facts constituted "reasonable cause" within the section. It was open to the Court of Appeal if they thought that the arbitrator had come to a wrong conclusion of law to reverse his decision and send the case back to him. In the present case the failure to make a claim within six months was, under the circumstances, occasioned by "reasonable cause."

King v. *Port of London Authority* [1920] A. C. 1 and *Luckie* v. *Merry* [1915] 3 K. B. 83 followed.

Appeal from the judge of the Lewes County Court, sitting as arbitrator under the Workmen's Compensation Act, 1906.

The applicant was a workman in the employment of the respondents. On January 31, 1917, he was engaged in moving some trucks. He got between two trucks and put his back against one truck and his feet up against another, and in exerting his strength to shift the truck he felt something give way in his groin, vomited and fainted. He reported the matter at once to the inspector who was in charge of the job on which he was engaged, and that man recommended him to obtain first aid from a Red Cross station, and told him that he need not come back to work that day. Three days later he told the chief inspector what had happened, and the chief inspector then gave him a letter to the Lewes Victoria Hospital, where he was seen by a doctor, and was fitted with a truss. He returned to work and continued to receive his old wages from that time until April 5, 1919, when he was discharged. He then made a claim for compensation under the Act.

He stated in his evidence that during nearly the whole of the period between the accident and his discharge he was doing supervising work. He could not do heavy work. During part of the time he had to sit about and was sometimes censured by the company's officials for not working. He did not look upon it as a trivial affair at the time, but a serious accident. Some time before he was discharged by the company he consulted his friends and was advised by them to wait until he was "sacked." He was able to go on with his work owing to the truss. He explained to the railway officials who complained about his not working and they made no further complaint.

The county court judge dismissed the application. In the course of his judgment he said: "During two and a half years the applicant failed to give the respondents any notice of a claim for compensation, though he was working for them the whole time. He did not regard his injury as trivial but as serious. During the whole time he was suffering more or less from double rupture alleged to have been caused by the accident, so much so that he had often to desist from his duty in order to sit down and rest. This led to his being found fault with by his superiors, yet it never occurred to him to give them any intimation that he had any idea of making a claim for compensation. The reason which he gives for this is that he consulted the secretary of his society and other friends and was advised to hold his claim in abeyance until—to use his own words—'he got the sack.' The natural result was to lead his employers to believe that he had no ground for nor intention of making a claim; and one does not need evidence to convince one that the respondents must have been put in a worse position for investigating the bona fides of the claim than if

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they had received notice in due time. I cannot think that the Legislature ever intended that a delay of two and a half years in making a claim should under such circumstances be reasonable. It would be clearly unjust to the employers and therefore could not be reasonable. It would mean that they would not merely be kept in the dark but lulled into a false security. It is one thing for an employee, after having given notice of his claim, to delay the prosecution of it. It is quite another thing deliberately to refrain for an unlimited time from giving any notice until something happens which makes it advisable to put forward a claim. I think the Act of Parliament has forbidden this, and therefore I have no option but to give effect to the objection raised on behalf of the respondents."

The workman appealed.

Shakespeare, *Edgar Dale* and *J. E. Raven* for the appellant. The learned county court judge has upon the facts as found by him come to a wrong conclusion of law. The defence to the proceedings is that no claim was made within six months of the accident, as required by s. 2 of the Act, and the county court judge has decided that the failure to make a claim within the prescribed period was not occasioned by "reasonable cause" within that section. He has mixed up the giving of notice of the accident with the making of a claim. His conclusion was wrong: *Luckie* v. *Merry* (1) and *King* v. *Port of London Authority*. (2) The question whether the employer is prejudiced in his defence by the omission is immaterial with reference to the making of the claim. It only applies to notice of the accident.

[Eve J. In *Luckie* v. *Merry* (1) the delay was only eight months. Here it is much longer.]

Upon the question of the length of the delay see *Coulson* v. *South Moor Colliery Co.* (3)

Harold Morris for the respondents. The ultimate decision of the question whether there is "reasonable cause" for the omission to make a claim within the statutory period is one of

(1) [1915] 3 K. B. 83.
(2) [1920] A. C. 1.
(3) [1915] W. N. 83; 84 L. J. (K. B.) 508.

fact for the judge, and this Court will not entertain an appeal from his decision.

[WARRINGTON L.J. See what was said by Lord Parmoor in *King* v. *Port of London Authority.* (1) The county court judge has here treated the question as one of law.]

The only evidence is that the respondents continued to pay the man his full wages. That does not by itself constitute "reasonable cause." See also *Prophet* v. *Roberts.* (2)

[ATKIN L.J. That was quite a different case.]

The county court judge after considering all the circumstances has come to a right conclusion upon them. That is a finding of fact which cannot be disturbed by this Court.

WARRINGTON L.J. (after stating the facts). I think there is one omission in the learned county court judge's statement of the facts. He said: "This led to his being found fault with by his superiors; yet it never occurred to him to give them any intimation that he had any idea of making a claim for compensation." I think he might equally well have said that it never occurred to the employers that this man was so suffering that at some time or other, if they either refused to give him work, or he was compelled to leave his work, he would have a claim for compensation. I think the officials must have known that if the circumstances were such that he did not continue to work, and to receive his wages, he would be driven to make a claim for compensation under the Act, and would be certain to do so. In my judgment what the learned county court judge has done is to find the facts and then on those facts to direct himself that according to the true construction of s. 2 of the Act, the workman has not shown "reasonable cause" for his omission to make a claim. The first question is whether the Court of Appeal is in a position to entertain this appeal or not. Various opinions have been given by different judges as to whether the question coming before the Court of Appeal is one of fact or of law. The latest statements on the point are to be found in *King* v. *Port of London Authority.* (1) There are statements in two of the speeches

(1) [1920] A. C. 31.

(2) (1918) 88 L. J. (K. B.) 975.

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of the learned Lords which are perfectly clear upon it. As to the other learned Lords it was not really essential in the view they took to decide that point at all. The first of those statements is in the speech of Lord Parmoor. (1) He says: "The second question before your Lordships is whether the learned judge exercised properly his judicial discretion in holding that the failure to make a claim within six months of the date of the accident was occasioned by reasonable causes, and consequently not a bar to the claim. No doubt the relevant facts should be found by the learned judge, and then it becomes a question of law whether these facts are such as to constitute a reasonable cause within the provision of the statute." Lord Wrenbury in his speech says: "In my opinion they were sufficient to satisfy in law the words, 'reasonable cause.' I say 'in law' because the question whether the cause which existed in fact was reasonable or not is, I apprehend, matter of law."

There are other statements by various members of the Court of Appeal to the same effect. It is quite true that in *Luckie* v. *Merry* (2) Pickford L.J. desired to leave the question open, but now being fortified by those opinions in the House of Lords I think I may say that my view clearly is, on the authorities and on principle, that the function of the county court judge as the judge of fact is to find what the facts are; and having done so he has to direct himself as a matter of law whether those facts constitute within the true intent and meaning of the statute a "reasonable cause"; that that is a question of law, and if the parties are dissatisfied with that opinion of the county court judge on the question of law, that point may be brought before this Court. If that is so, then I think we are entitled to do what was done by the House of Lords in *King* v. *Port of London Authority*. (3) The facts are sufficiently found by the judgment of the county court judge, and are not in dispute. It is now open to us, if we think that the county court judge has from those facts drawn the wrong conclusion of law, to reverse his decision and to send

(1) [1920] A. C. 31, 38.
(2) [1915] 3 K. B. 83.
(3) [1920] A. C. 1.

the matter back to him for the purpose of assessing the compensation which he ought to have assessed if he had come to the opposite conclusion to that at which he in fact arrived. On the facts the learned county court judge as a matter of law came to the conclusion that the failure to make a claim in this case was not occasioned by reasonable cause. On that, one case which appears to me to be very much in point as an example of the way in which such matters are dealt with by the Court is *Luckie* v. *Merry* (1); a decision of this Court. A man was in charge of a horse and van; he met with an accident which resulted in the crushing of his hand. Notice of the accident was given at once. The next day the employer sent for the workman and, after asking him about the accident, said: "You can potter about the factory until you are better." The workman continued to attend at the factory and did what work he could, receiving full wages all the time. At first the work he could do was little, but for about a month before his dismissal he was doing the work he had done before the accident, except part of the grooming of the horses. A little more than seven months after the accident he was dismissed for misconduct quite unconnected with the accident. He then claimed compensation. The only defence was that no claim had been made within six months of the accident. It was held that the failure to make a claim was occasioned by a reasonable cause. Lord Cozens-Hardy M.R. said this (2): "When the workman was discharged he made an application for compensation, and the only point raised against him was that he had not made a claim within six months from the date of the accident. The failure to make the claim is not a bar to the maintenance of proceedings if it is found that the failure was occasioned by reasonable cause." There the county court judge had found that there was reasonable cause, but he thought himself bound by two Irish cases to decide, as a matter of law, that there was no reasonable cause. Then the M.R. said this: "This raises an important point. It is this: an old servant meets with an accident in the course of his employment to the knowledge of

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(1) [1915] 3 K. B. 83. (2) [1915] 3 K. B. 87.

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his master, who treats him well and tells him, 'Notwithstanding you are not able to do your ordinary work, go and potter about in the works.' He remains there, and after a time he does his old work again fully, except that there is some portion of the grooming which he is not able to manage, but, speaking substantially, during more than six months he remains in the employment of his master, receiving his old wages, and for part of the time doing his old work. Is that a reasonable cause for not making a claim, which need not be a written claim? 'Reasonable cause' of course must have reference to the workman himself. I find a difficulty in appreciating how there can be any great importance from the employer's point of view in the claim being given within six months." Then he goes on to say (1): "In my opinion, if I am not bound by authority, I should say without hesitation, looking, as I am entitled to do, to the facts that this was an old servant, and his master when the accident was explained to him gave the direction above quoted, that there was reasonable cause from the man's point of view for not giving a notice such as this: 'I have no claim now because you are paying me my full wages, but mind you there may be in the future a contingent claim which I shall have against you for compensation.' That would be a sufficient notice. It would be narrowing the construction of the words, 'reasonable cause,' if we were to say that in this case, having regard to all the circumstances, there was not a reasonable cause. But the learned judge felt himself bound by the Irish cases. Of course one always speaks with the greatest possible respect of decisions of a co-ordinate Court in Ireland, but I think when those two cases are looked at it will be found that they scarcely warrant—certainly one of them does not—the use which is made of them by the learned county court judge. The first case was *Healy* v. *Galloway*. (2) It was decided under the old Act, in which there was nothing to bring in the question of reasonable cause as a justification for not having made a claim within six months. The decision of the Court there was that the mere fact that the employer had paid wages

(1) [1915] 3 K. B. 88.

(2) (1906) 41 Ir. L. T. 5.

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after the accident was not such a circumstance as amounted to a waiver on his part of notice of claim, or, to put it another way, as laid a foundation for an estoppel to prevent the master from asserting the truth—namely, that no claim had been made. That is the sole point of that case. Nothing was decided about reasonable cause, because in the old Act there was no mention of reasonable cause." Then Pickford L.J. said (1): "I do not think it necessary to discuss or question their statement that the mere payment of wages is a neutral fact which does not prove anything either one way or the other. That may or may not be correct. I do not think it necessary to examine into it. It must be very rarely indeed that you have the mere payment of wages without anything else. Here you have not the mere payment of wages without anything else. You have a payment of wages after the accident and its circumstances and its nature have been fully explained to the employer and to his foreman, and, although I do not ground my judgment upon it at all, possibly after the foreman had been informed that the workman had been advised to make a claim." I think the ground of that is that the employment of the workman by the master, coupled with the payment of the full wages and with the knowledge of the circumstances relating to the man's accident, are sufficient to justify the workman in assuming that the master knew that there was a claim for compensation, and that the reason why the claim was not put forward was that at that time he continued to be employed by the old employer, and received the full wages, so that there was no immediate necessity for making the claim. The other case which must be referred to on this point is *King* v. *Port of London Authority*. (2) A similar conclusion was arrived at in that case. I have already referred to it, for another reason. The headnote is as follows: "In a case in which the injured workman had been retained in the service of the employers at his former wages for more than six months after the accident had happened and had been reported:—Held, that there was evidence upon which the arbitrator might, under s. 2, sub-s. (1.) (*b*), of the Act, find that there was reasonable cause for delay in making a claim for compensation." There the workman had sustained an injury to his eye in December, 1915. He continued at his usual work until February 21, 1917, and it was after that that he made his claim, that is to say, it was made in that particular case more than a year after the date of the accident. The county court judge in that case had overruled the employers' objection of failure to make the claim, but there was a serious question whether he had sufficiently found the facts to enable him to do that. The Court of Appeal sent the matter back to the arbitrator. The House of Lords took the view that they ought themselves, the facts not being in dispute, to decide the question, and they decided it in the same way as the county court judge decided it—namely, that there was sufficient to justify the finding that there was reasonable cause for the delay. Lord Atkinson said this (1): "Now what is the nature of the reasonable cause other than mistake or absence from the United Kingdom, which excuses the workman from making a claim for compensation within six months from the date of the accident? Of course it is reasonable cause having reference to the workman himself. I think the cases of *Turnbull* v. *Vickers, Ld.* (2), *Luckie* v. *Merry* (3) and *Abbott* v. *Biggleswade Joint Hospital Board* (4), establish that where all the facts of a particular case prove, to the satisfaction of an arbitrator, that a workman, to the knowledge of the employer or his agent, intends to seek compensation for an injury by accident sustained by him, and the employer or his agent says or does something calculated to lead the workman to form a belief, on which he acts, that without making a claim, compensation will be given to him in the form of continuing him in his employment at his former wages, although he may not be able to do efficiently all his former work, the arbitrator as a judge of both law and fact, would be justified in holding that reasonable cause existed for the workman's omitting to make a claim formally within the six months." Then he states the facts and says: "I think that the rational conclusion to be drawn from this evidence is that the workman abstained from formally making a claim for compensation by reason of his being put into a light job at his old wages, thinking that this benefit was intentionally conferred upon him towards compensating him for the injury which he had sustained, and leading him to believe that he would get compensation without a formal claim." Then he says if that be so there was reasonable cause. With reference to that I am not quite sure what the learned Lord means by proving "to the satisfaction of an arbitrator, that a workman, to the knowledge of the employer or his agent, intends to seek compensation." Does he mean more than this ? I think really having regard to the expressions in the speech of the learned Lord it only means this, that the circumstances are such, known to the master, that he must know that if for any reason the man does not receive the wages he was receiving before the accident, and he is incapacitated by the accident from receiving them, that he will make a claim for compensation, or would be entitled to make a claim for compensation, and has no reason to believe that he will not. I think he must mean that. In this case it seems to me that the workman did believe—he does not say so, I must infer it—that having suffered as he had a very serious injury ; having informed the officials of his employers that he had so suffered ; they knowing that he was doing his work under considerable difficulty, and even complaining, but still retaining him and paying him his full wages, I think he was induced by that to believe that the employers recognized his right to compensation, and that he had abstained from making a formal claim because there was no occasion in his mind for doing so. If that be so, then I think the present case comes within both the decisions (*Luckie* v. *Merry* (1) in this Court, and *King* v. *Port of London Authority* (2) in the House of Lords), and I think the learned county court judge ought to have overruled the objection taken by the employers. The employers elected to stand upon the case as it was then presented to the county court judge, relying on their objection as to the failure to make the claim, and on that objection only,

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(1) [1915] 3 K. B. 94. (2) 88 L. J. (K. B.) 889; now reported [1920] A. C. 1.

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(1) [1920] A. C. 24, 26.
(2) (1914) W. C. and Ins. Rep. 323.
(3) [1915] 3 K. B. 83.
(4) (1915) W. C. and Ins. Rep. 533.

(1) [1915] 3 K. B. 83.

(2) [1920] A. C. 1.

and therefore it ought to be referred now to the county court judge to make the award which, but for his allowing that objection, he would have been bound to make.

ATKIN L.J. I agree. One of the questions in this case was whether the failure of the applicant to make his claim within six months from the date of the accident was occasioned by reasonable cause, and I think the first question that arises is whether the determination of that point is a question of fact or a question of law. I only propose to refer to two cases: *Luckie* v. *Merry* (1) and *King* v. *The Port of London Authority.* (2) In *Luckie* v. *Merry* (1) the learned county court judge had found that it was occasioned by reasonable cause. He expressed his own opinion that the cause was reasonable, but he had come to the conclusion that he was bound by the authority of two decisions of the Irish Court of Appeal, to hold that the cause was not reasonable, and on that case coming up to this Court, the Court of Appeal held that the learned county court judge was not in fact bound by those decisions to come to the conclusion that the cause was not a reasonable cause. But normally, if that were purely a question of fact, one would have thought that the right course to take would have been to send the case down to the learned county court judge to find the facts. But the Court of Appeal did not take that step. They in fact determined the point that the delay was occasioned by reasonable cause, and they sent down the case to the learned county court judge merely for the purpose of assessing compensation. But it is quite possible that in that case the Court of Appeal assumed that the learned county court judge had in fact found there was reasonable cause, and, having come to the conclusion that in law he had misdirected himself, they gave effect to his finding. They did not expressly decide the point, especially in view of the fact that Pickford L.J. expressly reserved it. The other case is *King* v. *The Port of London Authority.* (2) It appears to me that the effect of the speeches of the learned Lords and their decisions in that case is that it must now be

(1) [1915] 3 K. B. 83.

(2) [1920] A.C. 1, 14.

taken that the question whether or not the proved facts would be a reasonable cause is a question of law. I agree that the speeches are not quite uniform on that point. The Lord Chancellor in his speech says that he will not lay down any general principle that the continued payment of the same wages after the accident amounts to reasonable cause. Then he says: "The general atmosphere must always be considered. It is sufficient for me to say that the evidence given before the county court judge justified, without perhaps requiring, the conclusion that the workman made no formal claim for compensation because he formed the view, encouraged thereto by the conduct of the employer, that he would receive compensation, should incapacity supervene in the future, without the necessity of making a formal claim." That seems to me to be, so far, merely a proposition that the evidence given before the judge was evidence from which the conclusion to which he refers might be drawn. But he goes on to say: "It is very easy to imagine cases in which the attitude of the employer during the critical six months may appear to be at once so promising and so generous that there is very reasonable cause for an omission to give notice. There are other cases falling upon the other side of the line. It is enough for me to say that in my opinion the present case belongs to the first class." I should have thought that there the Lord Chancellor is expressing his decision that reasonable cause did in fact exist in that case. Lord Finlay's judgment I think again is rather pointed to there being evidence upon which the learned county court judge could in fact find. He says (1): "But I think that, on the facts of this case, the arbitrator was justified in finding that there was reasonable cause for not making the claim within six months, on the principle which was acted on by the Court of Appeal in *Luckie* v. *Merry*." (2) He gives his reasons; I do not want to refer to them. Then he says: "The applicant's case on this point is not a very strong one, but I think that it was open to the arbitrator, on the evidence to which he summarily refers, to find that there was reasonable cause

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(1) Ibid. 20.

(2) [1915] 3 K. B. 83.

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within the meaning of the section, and I understand his award as so finding." Of course if the arbitrator had found that upon satisfactory evidence, that was quite sufficient for the determination of that case. But Lord Atkinson's judgment is plainly this: He comments on the award made by the learned county court judge and he comes to the conclusion that there is really no finding there either of the facts or of the law and he rather criticises the award upon that ground. Then he goes on to say (1): "He makes no formal finding at all. As it has not been contended that the learned judge's note of the evidence is not accurate, although certainly meagre, I think that the applicant is, in justice, entitled to have that evidence considered by your Lordships, and to have such a decision on this preliminary point pronounced by this House as your Lordships are of opinion should have been pronounced by the county court judge." I am satisfied that Lord Atkinson would not have said that if he thought that the question was a question of fact because obviously it was not for the House of Lords to find a decision on a question of fact. I think what he did mean, and must have meant, was that there is no finding by the learned county court judge, but the facts are not in dispute and the House of Lords are entitled to come to the conclusion of law upon the admitted facts, and he comes to the conclusion that there was reasonable cause. Now Lord Parmoor says this (2): "The second question before your Lordships is whether the learned judge exercised properly his judicial discretion in holding that the failure to make a claim within six months of the date of the accident was occasioned by reasonable cause and consequently not a bar to the claim. No doubt the relevant facts should be found by the learned judge, and then it becomes a question of law whether these facts are such as to constitute a reasonable cause within the provision of the statute. There is no direct finding of the facts in the present case, but they never were in dispute." So that he finds again that there is no reason for interfering with the decision of the learned judge. The only remaining speech is that of Lord Wrenbury, and

(1) [1920] A. C. 23.

(2) [1920] A. C. 31.

he says this (1): "Upon this part of the case there is no finding of fact by the county court judge." Then he reads the reasons of the county court judge and goes on to say: "It is, however, the fact that the evidence is before your Lordships, and you are in a position to infer what the learned judge meant by 'the circumstances disclosed.' That means the facts. In my opinion they were sufficient to satisfy in law the words, 'reasonable cause.' I say 'in law' because the question whether the cause which existed in fact was reasonable or not is, I apprehend, matter of law. The decision in *Luckie* v. *Merry* (2) I think was right." Now if the learned Lords were right in saying that there had been no finding by the county court judge at all on the matter, it seems to me plain that the decision amounted to a determination that this was a question of law which the judge should determine. If it was otherwise then these statements of Lord Atkinson, Lord Parmoor and Lord Wrenbury are in the nature of dicta, but they are dicta of the very greatest weight, and it is very difficult to distinguish them from the actual ratio decidendi, and unless it is held to the contrary I must follow them. I think I am bound to come to the conclusion therefore that while it is the function of the judge to find the facts, the inference as to whether those facts do or do not amount to a reasonable cause is one of law and one for the Court.

One other comment I desire to make upon the question of "reasonable cause." In the judgment of Lord Cozens-Hardy in *Luckie* v. *Merry* (2), which I prefer to cite from the report in the Law Reports because some corrections and alterations have been made, he says (3): "'Reasonable cause' of course must have reference to the workman himself." That statement is repeated without a discussion of the point by Lord Atkinson in *King* v. *The Port of London Authority* (4): "Of course it is reasonable cause having reference to the workman himself." Now with great respect to the very eminent authorities from whom these dicta emanate I should venture to doubt whether that ought to be taken as the established law, because it seems to me impossible to divorce what is reasonable cause for the workman from its relation to the interests of the employer, having regard to the fact that the employer is under the statute entitled, in the absence of reasonable cause for the omission, to six months' notice. I think it is quite impossible to abstract the idea of reasonableness altogether from the circumstances affecting the employer. It may be quite possible, in view of the two sub-sections, one dealing with notice of the accident and the other with the claim, that reasonable cause in relation to the claim has no reference to the employer being prejudiced in his defence by reason of the omission to make a claim, because the expression of the words in the one sub-section rather leads to the conclusion that they are purposely omitted from, and not to be considered in the second. But, apart from that, I should have thought that it was certainly possible to consider the prejudice of the employer, and I doubt very much whether the dicta really meant to exclude that consideration. Then the only other question is what is really meant by "reasonable cause." Subject to, I do not like to say the criticism, but subject to the explanation which is suggested by my Lord of the passages in Lord Atkinson's judgment, which I have very little doubt fulfils the intention of the learned Lord, it appears to me that that definition for the purposes of this case is quite sufficient. He says: "I think the case of *Turnbull* v. *Vickers Ld.* (1), *Luckie* v. *Merry* (2), and *Abbott* v. *Biggleswade Joint Hospital Board* (3), establish that where all the facts of a particular case prove, to the satisfaction of an arbitrator, that a workman, to the knowledge of the employer, or his agent, intends to seek compensation for an injury by accident sustained by him, and the employer or his agent says or does something calculated to lead the workman to form a belief, on which he acts, that, without making a claim, compensation will be given to him in the form of continuing him in his employment at his former wages, although he may not be able to do efficiently all his former work, the arbitrator, as a judge

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(1) [1920] A. C. 38.
(2) [1915] 3 K. B. 83.
(3) [1915] 3 K. B. 87.
(4) [1920] A. C. 24.

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(1) (1914) W. C. and Ins. Rep. 323.
(2) [1915] 3 K. B. 83.
(3) (1915) W. C. and Ins. Rep. 533.

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of both law and fact, would be justified in holding that reasonable cause existed for the workman's omitting to make a claim formally within the six months." I think probably that for "intends to seek" you should substitute "is entitled to seek" compensation. That state of facts arises in this case. The only doubt that I have in my mind at all upon the propriety of deciding this point is the question whether or not we are entitled to draw what would be the inference of fact, that the workman acted upon the belief that he would get compensation. But it appears to me that upon the evidence in this case, that is the only inference it is possible to draw. You really have a case here in which there can be no doubt whatever but that this workman was in fact a workman who, when the accident happened, was entitled to make a claim for compensation, and to take the appropriate proceedings to have that liability declared on the footing of the procedure which is now laid down in the case of *King* v. *Port of London Authority.* (1) In this case the workman was ordered by the inspector to assist in moving a very heavy weight and, there and then, while he was doing it, in the presence of two other employees, he says that he felt something click; he fainted and vomited, and he was in fact ruptured, and that thereupon the inspector told him to go and get first aid and said he need not come back to work for the rest of that day. Two days afterwards he went to a chief inspector and got from him a letter to the hospital where he was fitted with a truss. After that he was unable, when he came back, to do the work which he had been doing before, but did this lighter work of supervision, although at full wages. From time to time he is incapacitated and has to sit down and is not able to work. When complaint of this is made by the officials he gives them the explanation, and then they are satisfied and the company continues to pay him full wages during the whole of that time. It appears to me that the inference is irresistible that the conduct of the employers has led this man to think that when the time came, if it ever did come, for him to claim compensation, because he was out of work, or his earning capacity

(1) [1920] A. C. 1.

was diminished, the employers would accept the liability and would pay him the proper amount under the Act. Under these circumstances it appears to me that the conduct of the employers in paying the full wages certainly amounted to a reasonable cause. I think that the right inference is, not merely that the employers' conduct is calculated to produce that effect, but that it did produce that effect, that the man did not claim compensation, and his belief is evidenced by his acts. Then reference is made to the fact that he discussed the matter with his friends and they said : " Well, do not make a claim until you have got the sack." I think all that that means is : as long as you are in their employment and you are getting your full wages there is no necessity to take legal proceedings against them. I do not see that there is any ground whatever for suggesting that such advice, even if acted upon, in the circumstances of this case affected the question of reasonable cause. For these reasons I think that the learned county court judge came to the wrong conclusion of law upon the admitted facts, and that the case ought to go back to the judge for the purpose of assessing the compensation.

EVE J. I agree entirely with the conclusion at which the Lords Justices have arrived : a conclusion which is, I think, inevitable, having regard to the decisions in *Luckie* v. *Merry* (1) and *King* v. *Port of London Authority*. (2) I only desire to add that I respectfully adhere to what was said by this Court in *Prophet* v. *Roberts* (3) with regard to the requirement that a claim for compensation should be made within six months. In determining whether the proviso in s. 2, sub-s. 1 (*b*), of the Act has become operative it is incumbent firmly to bear in mind that the sub-section constitutes a statutory protection for the employer ; a protection of which he ought not to be deprived unless all the circumstances warrant the conclusion that reasonable cause for not complying with the statute has been proved to exist. I think that the length of time which has elapsed since the expiry of the six months must always be a very material factor in determining whether or not that state of things has been proved to exist.

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(1) [1915] 3 K. B. 83.
(2) [1920] A. C. 1.
(3) (1918) 88 L. J. (K. B.) 975.

Appeal allowed.

Solicitors for appellant: *Hilder, Roberts & Giles.*
Solicitor for respondent: *E. A. Scanes.*

G. A. S.

[IN THE COURT OF APPEAL.]

ASHRODY *v.* OWNERS OF SHIP, "CITY OF EDINBURGH."

C. A.
1919
Oct. 31.

Employer and Workman—Indian Seaman—Compensation for Injury—Liabilities of Employer under Merchant Shipping Acts—Declaratory Order of Liability—Merchant Shipping Act, 1906 (6 *Edw.* 7, *c.* 48), *s.* 34—*Workmen's Compensation Act,* 1906 (6 *Edw.* 7, *c.* 58), *s.* 7, *sub-s.* 1 (*e*).

By s. 7, sub-s. 1, of the Workmen's Compensation Act, 1906, the Act is applied to seamen subject to certain modifications including (*e*), which provides that the weekly payment shall not be payable in respect of the period during which the shipowner is under the Merchant Shipping Acts liable to defray the expenses of maintenance of the injured seaman:—

Held, that the effect of the sub-section was to place an injured seaman in the same position as an ordinary workman as regards his right to compensation and that where he was receiving full wages and the benefits given him by the Merchant Shipping Acts, his right to receive the weekly payments did not arise until his right to receive those wages and benefits ceased.

Held, therefore, on an application by an injured seaman for compensation under the Workmen's Compensation Act, 1906, who was still in receipt of full wages and benefits under the Merchant Shipping Acts that the proper course for the county court judge to adopt was to make an award in the form of a declaration of liability with liberty to the applicant to apply to have the amount of the weekly payment assessed when the payment of the wages and benefits ceased.

A county court judge has jurisdiction to make a declaratory award notwithstanding that it has not been asked for by either of the parties.

Appeal from an award of the judge of the Liverpool County Court, sitting as arbitrator under the Workmen's Compensation Act, 1906.

The applicant, an Indian coloured seaman, signed on in Calcutta the articles of the *City of Edinburgh*, a ship belonging to the respondents, as a seaman for a voyage to Great Britain and back to Calcutta, at the wages of 21 rupees, then equal to 28*s.* per month. In addition he received from the respondents food and lodging on board the ship, which were estimated to be worth to him 10*s.* 6*d.* per week.

On June 25, 1918, while at work on board the ship, which was then in a Liverpool dock, he slipped down one of the hatches and received severe injuries—namely, a deep cut on the left side of his head, a fracture of his left collar-bone, and a fracture of his left femur. He was taken to the Bootle Borough Hospital, where he remained eleven months as an in-patient, and, though now in a boarding-house and able to move on crutches, he would be permanently injured in such a way as to preclude in all probability the possibility of his working as a seaman again. The respondents admitted their liability under s. 34 of the Merchant Shipping Act, 1906, to pay the applicant wages, costs of maintenance, and medical expenses while in hospital, and maintenance in his present boarding-house while awaiting conveyance to Calcutta, and the costs of his repatriation to Calcutta.

In May, 1919, applicant visited the respondents' office on two or three occasions, and the respondents discussed with him the question of his claim for compensation. On May 29, 1919, they made him an offer of 60*l.* in settlement of all claims against the ship *City of Edinburgh*, which sum the applicant accepted and signed a receipt for by placing his mark. The amount being large for a Lascar to have in his custody, 55*l.* was handed back by applicant to the respondents to give to the captain of the ship by which the applicant was to be conveyed back to Calcutta, and was to be given to him there, together with his wages to which he would then be entitled under the Merchant Shipping Act, 1906, on his discharge from his ship.

On June 2, 1919, the applicant, by his solicitor, made a claim for compensation under the Workmen's Compensation Act, 1906. The respondent's solicitors replied that applicant had not explained the position to his solicitors, that the respondents had agreed to pay the applicant 60*l.* in respect of compensation, 5*l.* of which he had already received from them on account and the balance of which would be paid to him upon his return to India, and that his wages and hospital expenses would also be paid. In answer the applicant's solicitor wrote requesting some explanation as to the agreement, and as to the respondent's position, and finally on June 6 the respondents' solicitors wrote: "We have received your letter of yesterday. We do not understand how your client can say he did not enter into an agreement as mentioned by us, as he signed it, and a receipt for 5*l.* on account. It has not been suggested that your client was without rights under the Workmen's Compensation Act, but the amount of our clients' liability has been settled by agreement between the parties."

On June 13, the applicant commenced the present proceedings for arbitration, claiming by his request an immediate award in his favour of 1*l.* 5*s.* a week during his total incapacity for work.

The respondents, by their answer, stated (inter alia) that the particulars were inaccurate or incomplete and that they denied their liability to pay compensation under the Act in respect of the injury to the applicant mentioned in his particulars on the ground (inter alia) "That in any event having regard to s. 7, sub-s. 1 (*e*) (1), of the Act the applicant is not entitled to any weekly payment under the Act. That on the 29th of May, 1919, the applicant accepted the sum of 60*l.*

(1) Workmen's Compensation Act, 1906, s. 7, sub-s. 1: "This Act shall apply to masters, seamen, and apprentices to the sea service and apprentices in the sea-fishing service, provided that such persons are workmen within the meaning of this Act, and are members of the crew of any ship registered in the United Kingdom, or of any other British ship or vessel of which the owner, or (if there is more than one owner) the managing owner, or manager resides or has his principal place of business in the United Kingdom, subject to the following modifications . . . .

"(*e*) The weekly payment shall not be payable in respect of the period during which the owner of the ship is, under the Merchant Shipping Act, 1894, as amended by any subsequent enactment, or otherwise, liable to defray the expenses of maintenance of the injured master, seaman, or apprentice. . . ."

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paid by the respondents in full satisfaction of all claims against respondents in respect of his injury."

At the hearing before the county court judge counsel for the respondents by consent abandoned the question of any agreement of settlement having been arrived at, and submitted that no question had arisen for decision, as there was a liability on the respondents to pay full wages until the applicant was returned to Calcutta, to which port the respondents were bound to carry him at their own expense; that until he reached Calcutta the respondents were liable for maintenance and medical expenses; and that there could be no question of compensation, having regard to s. 7, sub-s. 1 (*e*), of the Workmen's Compensation Act, 1906, and an award, if made, would be a prospective award and bad; that upon launching the proceedings, the only dispute was whether 60*l*. had been accepted by the applicant in full settlement, and that that question having been abandoned, there was no question for arbitration left.

The county court judge held that a dispute had arisen, and that the withdrawal during the course of the hearing of the question whether an amount had been accepted by the applicant in full settlement did not leave this Court without jurisdiction; that the Court had no power to make an award fixing the amount of the compensation, as no sum in respect of that was presently payable to the applicant, and that would only arise after the applicant's return to Calcutta and the payment of his wages as a seaman under the articles had ceased; and that, therefore, the proper course was to declare that the respondents were liable to pay compensation for the accident as one arising out of and in the course of the applicant's employment, with liberty to apply afterwards with regard to the amount of the compensation if it became payable.

The respondents appealed.

A. T. Miller K.C. and *S. L. Porter* for the respondents. The county court judge was wrong in holding that the respondents were liable to pay compensation to the applicant having regard to the provisions of s. 7, sub-s. 1 (*e*), of the Workmen's Compensation Act, 1906. At the hearing the respondents admitted their liability under s. 34 of the Merchant Shipping Act, 1906, to pay the applicant his wages, costs of maintenance and of his repatriation to Calcutta and elected to abandon the agreement to pay him 60*l*. in full satisfaction of his claim. No question was therefore left for arbitration and the county court judge had accordingly no jurisdiction to make an award in favour of the applicant. As long as the respondents are discharging their liability under s. 34 of the Merchant Shipping Act, 1906, the applicant can have no title to compensation under the Workmen's Compensation Act, 1906. The observations of Lord Loreburn and Lord Halsbury in *McDermott* v. *Owners of S.S. Tintoretto* (1) show that it was the intention of the Legislature that the Acts should not overlap. Sub-s. 1 (*e*) of s. 7 of the Workmen's Compensation Act enables the applicant to make a claim for compensation when he arrives at Calcutta and the payments under the Merchant Shipping Act have ceased. An award in the form of a declaration of liability ought therefore not to have been made. Further the declaratory award was not asked for by either of the parties and the county court judge had therefore no jurisdiction to make it. *Marshall* v. *Clayton & Shuttleworth* (2) shows that if such an award is desired it should be applied for at an early stage in the proceedings.

W. J. Lias for the applicant was not called upon.

WARRINGTON L.J. This is an appeal of the respondents from an award of the judge of the Liverpool County Court making a declaration of liability, but, for the moment, awarding no compensation. It is said that that award ought to be discharged and the applicant's request for arbitration dismissed on the ground that no question had arisen, either as to liability, amount or duration of compensation, and, also on the ground that at that time when the award was made, the applicant, by virtue of the provisions of s. 7 of the Workmen's Compensation Act, 1906, relating to seamen, had no title to compensation.

(1) [1911] A. C. 35, 39, 40.

(2) [1919] 1 K. B. 509.

It is further said that the declaratory award ought not to have been made, because neither of the parties asked for it; but it was made by the judge as being what he thought was a just method of dealing with the question that was before him.

Now the facts are these. [His Lordship stated the facts down to the filing of the applicant's request for arbitration and the respondents' answer thereto and continued:] Now, after that request and answer, how can it possibly be said that there was no question giving the arbitrator jurisdiction? The applicant was asserting his claim to an immediate award of a weekly payment during his total incapacity from a certain date; the respondents were asserting that in any event, having regard to s. 7, sub-s. 1 (*e*), of the Workmen's Compensation Act, 1906, the applicant was not entitled to any weekly payment under the Act, and, further, that he had accepted 60*l.* in full discharge. On that, the matter came before the learned county court judge, and at the hearing the respondents gave up their case as to the agreement. I need not go further into that, but the point that was argued before the learned county court judge by the applicant was that s. 7, sub-s. 1, which I will read directly, did not exclude him from a right to compensation, or from the right which he claimed to have an immediate award fixing the amount of compensation. The respondents on the other hand contended that the effect of that sub-section was to deprive the applicant altogether for a time of any right to claim compensation, and not merely to postpone payment. After hearing the arguments on both sides at considerable length, the learned county court judge, in a reserved judgment, adopted the view that the applicant was entitled to compensation, but that payment of the weekly payments provided for by the Act was to be postponed during the period specified in the Merchant Shipping Act, 1906, and he made a declaratory award. It is from that award that this appeal is brought.

The position therefore is this: Under s. 34 of the Merchant Shipping Act, 1906, if a seaman belonging to a ship receives any hurt or injury in the service of the ship, the necessary surgical and medical advice, and also the expenses of the maintenance of the seaman until he is cured, or is returned to a proper return port, and of his conveyance to that port, are to be defrayed by the owner of the ship without any deduction on that account from his wages. The owner is also liable to pay the seaman his wages, because until he is returned to his return port, the voyage for which he has been engaged has not terminated and he has not been discharged. That is the seaman's right under that Act. I now turn to the Workmen's Compensation Act, 1906, on which the question mainly turns. Sect. 7, sub-s. 1, provides: "This Act shall apply to masters, seamen, and apprentices to the sea-service and apprentices in the sea-fishing service, provided that such persons are workmen within the meaning of this Act, and are members of the crew of any ship registered in the United Kingdom, or of any other British ship or vessel of which the owner, or (if there is more than one owner) the managing owner, or manager resides or has his principal place of business in the United Kingdom, and subject to the following modifications. . . . ." The applicant is a "seaman" within that provision. The only modification to which it is necessary to refer is clause (*e*), which provides: "The weekly payment"— that is, of course, the weekly payment referred to in other parts of the Act and in the schedules—"shall not be payable in respect of the period during which the owner of the ship is, under the Merchant Shipping Act, 1894, as amended by any subsequent enactment, or otherwise, liable to defray the expenses of maintenance of the injured master, seaman, or apprentice." The respondents in this case were liable to pay the expenses of the maintenance of the applicant, and are still liable to do so because he has not yet been returned to Calcutta. The weekly payment, therefore, is not payable during the current period, and was not payable at the time the learned county court judge made his award, but what is said is that not only is he not entitled to a weekly payment, but that he was not entitled to compensation, that is to say, he was not a person who, at the time the learned county court judge made his award, was entitled to compensation under the Workmen's

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Compensation Act, 1906. For that contention some reliance was placed on what was said by Lord Loreburn in *McDermott* v. *Owners of S.S. Tintoretto.* (1) The question in that case was whether payments made under the Merchant Shipping Acts were to be taken into account in fixing the amount of the weekly payment under the Workmen's Compensation Act, 1906, and it was held that in fixing the amount of such weekly payment in respect of the man's continued incapacity in England regard must not be had to the payment of his eight days' wages or of his maintenance and other expenses. But, incidentally, Lord Loreburn deals with the question as to the way in which the Merchant Shipping Acts and the Workmen's Compensation Act, 1906, work together. After referring to the provisions of the Merchant Shipping Acts he says: "In 1906 the right to compensation for accidental injury was extended to seamen, and begins when the injured seaman ceases to be entitled to maintenance. It is clear that compensation is to begin exactly where the right to maintenance ends. Reading the words of the Act which we have to construe in the light of what I have just said, I have no difficulty in seeing where their generality is limited. It is not every payment, allowance, or benefit which the workman may receive from the employer during the period of his incapacity that the county court judge must have regard to. It is only such as are received in respect of the incapacity, and received in respect of that period of it which is covered by the compensation. It means, in short, that the man is not to be paid twice over, by the overlapping of benefits derived from two separate Acts of Parliament." Now what is said is that that passage is, after all, only obiter dictum. But it is said that Lord Loreburn, in using the words, "the right to compensation . . . . begins when the injured seaman ceases to be entitled to maintenance," is expressing the view that the provisions of sub-s. 1 (*e*) of s. 7 of the Workmen's Compensation Act, 1906, postpones not only the workman's right to receive the weekly payment, but his right or title to compensation. If however you read the

(1) [1911] A. C. 35, 39.

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whole of what Lord Loreburn says I think it is quite plain that he does not mean that. He uses the expression "the right to compensation" in the first of the sentences which I have read, but when you go on to read the rest of the passage I think the noble and learned Lord makes the matter quite clear. He continues: "It is clear that compensation is to begin exactly where the right to maintenance ends." Lord Halsbury puts it very concisely but in terms which I think exactly express that meaning. He says (1): "It appears to me that, as usual, we have slipshod phraseology put into an Act of Parliament, but I think it may be solved by almost one sentence: the payments (I use that word in its strict sense) are not to overlap." In my opinion, those statements made by the two noble and learned Lords, as I read Lord Loreburn's statement, are in exact accordance with what appears to me to be the obvious meaning of the provision in sub-s. 1 (*e*). That provision is: "The weekly payment"—that is the weekly payment to which it is assumed the workman is entitled by virtue of the previous provision contained in s. 7—"shall not be payable in respect of the period" prescribed. That, to my mind, means that the workman is entitled to compensation, but that he is not entitled to receive the weekly payments during the period described in that clause (*e*). Now, that being the applicant's right, the applicant being entitled to compensation by virtue of that provision, and not being in a position to receive the actual weekly payment, and, more than that, the learned county court judge not being in a position to assess the amount of the weekly payment as I think he clearly was not during the period of suspension, it seems to me that he exercised a proper discretion in making the award he did—namely, the declaratory award. There is no cross-appeal. The applicant does not quarrel with the award, at least so far as the proceedings in this Court are concerned; he is content with it, and, it seems to me that the learned county court judge was quite right.

But it is said that a declaratory award ought not to be made without an application on the part of one or other of the two

(1) [1911] A. C. 40.

parties, and in support of that reference is made to *Marshall* v. *Clayton & Shuttleworth.* (1) In that case the county court judge had made an award adverse to the applicant and dismissing his claim for compensation, and then, after judgment had been given against him, the applicant for the first time asked for a declaratory award which was refused, and this Court held that the application at that stage of the proceedings was improper, and that if a party wishes to have a declaratory award he must not wait until the judge has decided against him and then say: "You ought not to have decided the case in that way, you ought to have decided it in my favour." That is the point that that case decided. But it is quite a different thing to say that the learned county court judge may not, if he thinks fit, instead of dismissing an applicant's application altogether, or instead of making an immediate award against the respondent, if he thinks it is not a case either for dismissing the application or for making the award, make a suspensory award. In this case I think the learned county court judge exercised, and was entitled to exercise, a discretion in that matter, and exercised it very wisely and properly.

Then, lastly, the respondents' appeal, or seek to appeal, for I do not think, with regard to that point, an appeal lies, against the order of the learned county court judge directing them to pay the costs. That is a matter entirely in the discretion of the learned county court judge, and they cannot complain.

The result is that, in my opinion, this appeal fails and must be dismissed.

ATKIN L.J. I agree. I think that the Workmen's Compensation Act, 1906, is, by s. 7, expressly intended to apply to seamen in exactly the same way as it applies to any other workmen to whom the Act applies, subject to the express modifications contained in the section. I think the section means that when a seaman has met with injury from an accident arising out of and in the course of his employment, he has the statutory right to compensation. There may be certain limits of time, which may vary by reason of the modifications in the statute, for making that claim. It is contended, however, on the part of the respondents that the Act does not apply to a seaman who comes within the provisions of clause (*e*) of sub-s. 1 as long as the owner of the ship is liable to defray the expenses of the maintenance of the seaman under the Merchant Shipping Acts, 1894 and 1906. That clause provides: [His Lordship read the clause (*e*) and continued:] Now, I do not read that clause as taking out of the provisions of the Act a seaman who is being maintained under the provisions therein referred to. To my mind he has a full statutory right to an award of compensation, and I think that all that the clause means is that he is not to receive the amount of compensation, not merely so long as he is having his expenses defrayed in fact, but so long as the owner is liable to defray the expenses of maintenance. That seems to me to be the plain meaning of clause (*e*) of sub-s. 1, which to my mind contains very plain words to modify the right conferred on the seaman by the first part of the sub-section. Further I observe that in s. 7, sub-s. 1 (*a*), it is provided that "The notice of accident and the claim for compensation may, except where the person injured is the master, be served on the master of the ship as if he were the employer." I think that clause contemplates that an injured seaman, the obligation to maintain whom falls on the shipowner, may have to make a claim for compensation to the master of the ship while he is on the ship and while there is a master to the ship to which he is attached. I see no reason at all why a seaman should be put in a worse position than any ordinary workman. If it were otherwise, the position would be this: that a seaman even after his discharge, as long as he is in fact being maintained, would not be able to come before the Court and establish the circumstances of his case; the crew would be dispersed, the facts would be difficult of proof, and he would be in the position of not being able to have recourse to the Court of Arbitration to determine what might be a very difficult question of liability. I do not think that is contemplated, and I am satisfied that that was not intended to be the effect of the decision in

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(1) [1919] 1 K. B. 509.

McDermott v. *Owners of S.S. Tintoretto.* (1) To my mind the effect of that decision is really summed up in the speech of Lord Halsbury. I think the sole effect of that decision is that payments are not to overlap, and that would give a very rational meaning to clause (*e*) of sub-s. 1 of s. 7.

Now what was contended, as I understand, by the applicant was that assuming the right to compensation existed—which I think it did—all that s. 7 provides is that the judge was to fix the compensation and then that clause (*e*) merely effects a statutory stay of the weekly payments as long as the period subsists which is there mentioned. In this particular case, the applicant was in receipt of full wages, and the result was that in assessing the amount of the compensation, which by the Act is expressed to be a weekly payment, it was impossible for the learned county court judge to have regard to the difference between the wages the applicant earned before the accident and the wages which he earned or was capable of earning after the accident, because he was earning just as much afterwards as before the accident from the respondents. It was therefore a case where, if the applicant had been an ordinary workman, it would have been impossible for the judge to award a weekly payment, and where the right course to take would have been either to make a declaration of liability, or to adjourn the case, according to the decision in the House of Lords in *McDermott* v. *Owners of S.S. Tintoretto* (1) with a declaration of liability. I, for my part, should like to reserve my opinion as to the case where the workman is receiving maintenance, but where the wages after the accident either are not being paid to him or have been diminished, for I am by no means satisfied that in a case of that kind the learned judge might not make an award of a weekly sum subject to this statutory stay. I express however no opinion on that point: I merely desire to reserve it. At all events, subject to that, it seems to me the right order to make in this case was the declaratory award.

It is said in this particular case that the judge ought not to have made a declaratory award because, first of all, there was no dispute at all about the question of liability. As to that I entirely disagree. There was a dispute. The facts were stated, and the defence set up by the respondents was that there was no liability at all on them under the Workmen's Compensation Act, 1906, because the applicant had agreed to accept and had received a sum of 60*l.* in full settlement of his claim; and, if that were so, there would be no further right to compensation under the Act. That was disputed by the applicant, and, in fact, the alleged agreement was withdrawn at the hearing, and when the matter comes before us we find that at any rate there was a dispute that justified arbitration proceedings.

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(1) [1911] A. C. 35.

Then it is said that the declaratory award was not asked for by the applicant in the course of the proceedings before the county court judge. I am not satisfied that it was not, but, even if it was not asked for, I see no reason why the learned county court judge, in deciding upon a matter such as this, where a claim is made for the full weekly payment, should not, if he thinks it right, make a declaratory award. I think it would be a very wrong thing to suppose that the learned county court judge is debarred from making it on his own motion merely because the parties do not appear to have asked the precise question, and I am clearly of opinion that there is no decision of this Court to the contrary of that. Of course, I am far from saying that the learned county court judge's judgment cannot be appealed against if he is wrong on any point of law. That is a different matter, but where there is no objection on the law I think his decision must stand.

Marshall v. *Clayton & Shuttleworth* (1) has been referred to, and for my part I do not think that that case decides more than this, that the judge having been asked in the exercise of his discretion at the end of the trial after delivering his judgment to do something, he refused to do it, and the Court of Appeal, I should say very naturally, thought there was nothing wrong in his exercise of that discretion. However, for the reasons which I have given, it appears to me that the

(1) [1919] 1 K. B. 509.

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judgment in this case was correct and the appeal should be dismissed with costs.

EVE J. I agree.

Appeal dismissed.

Solicitors for appellants: *Hill, Dickinson & Co., Liverpool.*

Solicitor for respondent: *A. Sugden, for R. Barrow Sicree, Liverpool.*

W. I. C.

1919
Nov. 11, 12, 21.

PENNSYLVANIA COMPANY FOR INSURANCES ON LIVES AND GRANTING ANNUITIES *v.* MUMFORD.

Insurance—Lloyd's Banks' and Trust Companies' Policy—Construction of.

The plaintiffs carried on the business, amongst others, of acting as custodians of securities deposited with them by customers. They were insured under a policy underwritten by the defendant for a period of twelve months from September 30, 1916, against all losses which they might, during the twelve months, discover that they had sustained at any time since September, 1909:

1. "By reason of any bonds, debentures, scrip, certificates, warrants .... or other similar securities .... the custody of which they have undertaken, and which now are or are by them supposed or believed to be .... in or upon their premises .... being while so in or upon such premises .... made away with by .... theft .... embezzlement, burglary or abstraction .... whether by the officers clerks and servants of the assured or any other person."
2. "By reason of any securities of the description above specified being .... stolen, misappropriated or made away with by .... fraud of their officers clerks or servants .... whilst in transit .... between any houses or places within 100 miles from Philadelphia" where their business premises were situate.

In May, 1917, during the currency of the policy the plaintiffs discovered that W., one of their servants, had between September, 1909, and September 23, 1916, fraudulently made away with large quantities of securities deposited with them by customers. Securities deposited with the plaintiffs were kept in strong rooms or "vaults" in the custody of an officer called the vault clerk. Customers desiring to withdraw securities frequently went to the plaintiffs' premises themselves or sent a person on their behalf and the securities were taken from the vault to the customers' reception room and handed over to them there. W. obtained possession of the securities in question from the vault clerk by fraudulently pretending that he was authorized to receive them on behalf of their owners, and having forged the owners' receipts for them and delivered those receipts to the plaintiffs he misappropriated the securities to his own use. There was no evidence that the vault clerk when handing the securities to W. did not suppose that they were to be taken and delivered to the owners in the reception room :—

Held, (1.) That in the sentence in clause 1 of the policy "by them supposed or believed to be" the words "by them" were to be read with "believed" as well as "supposed"; that it was not sufficient to bring a loss within that clause that the securities were believed by the customers to be on the premises at the date of the policy; and that consequently, as the plantiffs knew that the securities had been withdrawn before that date, clause 1 did not apply.

(2.) That a transit between the vault and the customers' reception room was not a transit between two places within the meaning of clause 2; and that the defendant was not liable on the policy.

TRIAL OF ACTION before Roche J.

The action was brought upon a Lloyd's policy of insurance dated September 30, 1916, and underwritten by the defendant whereby the several underwriters agreed in the proportion which the sums underwritten by them bore to 20,000*l.* to make good to the plaintiffs "all such direct losses as they . . . . may during the space of twelve calendar months from noon of the 30th day of September, 1916, to noon of the 30th day of September, 1917, discover that they have sustained in manner hereinafter mentioned, that is to say :—

"1. By reason of any bonds, debentures, scrip, certificates, warrants, transfers, coupons, bills of exchange, promissory notes, cheques, banknotes, specie, currency, coin, or other similar securities, whether payable to bearer or otherwise . . . . in which they are interested or the custody of which they have undertaken, and which now are or are by them supposed or believed to be or at any time during the said period of twelve months may be in or upon their own premises . . . . being, while so in or upon such premises . . . . lost, destroyed, or otherwise made away with by robbery, theft, fire, embezzlement, burglary or abstraction . . . . whether by the officers, clerks and servants of the said assured or any other person or persons or by the negligence or fraud of the said officers clerks and servants.

"2. By reason of any securities of the description above specified being lost, stolen, mislaid, misappropriated, or made away with, whether by negligence or fraud of their officers clerks or servants, or any messengers or otherwise, whilst in transit in their own hands or in the hands of their officers clerks or servants or any messengers between any houses or places situate within 100 miles from Philadelphia . . . . such risk or transit to commence on every security or parcel of securities from the moment of the person into whose hands the same may be delivered on behalf of the said assured receiving the same and to continue until the delivery thereof at destination.

"Provided that the total liability of each of the undersigned in respect of any one loss under this guarantee is limited to the amount underwritten by him irrespective of the total value of the securities comprised in such loss. . . .

"Warranted free of all claim for losses not discovered within the said period of twelve calendar months . . . . and for losses sustained prior to the date of inception to wit the 30th of September, 1909, of the first policy of this nature effected by the assured with Lloyd's underwriters in London."

The following statement of the facts is taken from the judgment: "The plaintiff company is incorporated in the State of Pennsylvania, U.S.A., and part of the business conducted from its offices in Philadelphia is to keep securities for its customers in safe deposit and to collect dividends and interest thereon. The defendant is sued in the usual way as the representative underwriter and I shall, for convenience, in the narrative part of this judgment deal with the figures which represent the total claim against the underwriters of the policy and the total counterclaim by them for return of moneys paid. The facts giving rise to the action are as follows: Before and after September, 1909, and down to October, 1916, one Jesse Williamson was a trusted servant of the plaintiff company and from 1913 he held the office of secretary. The system of the plaintiff company was that particular servants and officers of the plaintiff company had allocated to them the transaction of business with and for particular customers. Amongst the customers whose business was at all material times allocated to Williamson were four ladies. In October, 1916, for reasons immaterial to this action, Williamson's services were dispensed with, and in May, 1917, it was discovered that between September, 1909, and the end of his employment Williamson had fraudulently made away with securities deposited by the four ladies of a value of 147,610*l.* The plaintiff company made the loss good to the ladies and claimed upon the underwriters. Williamson's methods, so far as material, were these: The plaintiff company occupies a large building in Philadelphia for its business purposes and maintains a separate part of such building with locked gates as a strong room or rooms called "vaults" controlled by an officer called the vault clerk. Securities deposited with the plaintiff company are kept in these vaults and cannot be withdrawn without presentation to the vault clerk of a withdrawal card signed by certain officers of the company authorised in that behalf. Williamson was not one of such officers authorised to sign, but he presented to authorised officers withdrawal cards for signature in respect of securities, professing to do so at the request of the customers to whom they belonged. Having obtained the necessary signatures he presented the withdrawal cards to the vault clerk and was given the securities for delivery to the customers. He misappropriated the securities, but by means of forged receipts purporting to be the customers' receipts deceived the vault clerk and the plaintiff company, and by means of a regular payment of the interest on the securities to the customers deceived those ladies as to the whereabouts and safety of their property. One other fact is of importance—namely, that when the customers' receipts were forthcoming the securities were of course treated by the plaintiff company by the appropriate entries in their books as no longer in their custody."

In addition to the securities so withdrawn by Williamson from the vaults there were certain others, seven in all, being the items numbered 19, 27, 29, 30, 32, 33, and 35 in the particulars of claim, which had been purchased by one or other of the said ladies through the plaintiffs as agents, and which were delivered to Williamson as an official of the plaintiffs for the purposes of deposit in the vaults and misappropriated by him. Williamson's total misappropriations were spread over seven years, and occurred on forty-one different dates commencing with March 24, 1910, and the last being on September 23, 1916, a few days before the date of the policy sued upon and before he left the plaintiffs' service. In May, 1918, the underwriters, who did not at that time appreciate that the policy was open to the construction that upon the facts of the case it did not cover any part of the loss, paid to the plaintiffs the sum of 20,000*l.* claiming that that was the total extent of their liability. The action was brought to recover the balance of the total loss of 147,610*l.* after giving credit for the 20,000*l.* paid. The defendant set up the defence that the loss was not within the policy, and on that view he counterclaimed to recover back his proportion of the 20,000*l.* as having been paid under a mistake of fact. He further set up the alternative defence that if the loss was within the policy there was only one loss, and that the underwriters' liability in respect of it being limited to 20,000*l.* that sum had been paid.

R. A. Wright K.C. and *Stuart Bevan K.C.* for the plaintiffs. The policy is against two kinds of losses—those dealt with by clause 1, which occur while the securities are in the plaintiffs' custody upon their premises, and those dealt with by clause 2, which occur while the securities are in transit. It will be said for the defendant that the loss of the securities withdrawn from the vaults do not fall within clause 1, because the plaintiffs had got what purported to be the owners' receipts for them and had entered the securities in their books as withdrawn before the policy was effected, and consequently could not have supposed or believed the securities to be on their premises on September 30, 1916, the date of the policy. But the words " by them " in the sentence " by them supposed or believed to be " qualify the word " supposed " only and not the word " believed." The sentence must be read as meaning " supposed by the company or believed by the customers," for otherwise the use of the two verbs if read as referring to the same person would be tautologous. It will further be said that they do not fall within clause 2, because the misappropriation took place upon the premises as soon as Williamson got the securities into his possession with the intention of converting them, that to constitute a "transit" between the two "places" within the meaning of the clause one of the places must be external to the plaintiffs' premises, and that a purely intramural transit from the vault to the customers' reception-room is not enough. But there is no reason for so limiting the meaning of the word "places." It is clear that part of the transit may be upon the plaintiffs' premises, for it is expressly provided that the transit is to commence from the moment that the securities are delivered into the hands of the agent of the plaintiffs, and if a loss which occurs during that portion of the transit is within the clause where the destination is outside the premises, there is no reason why it should not equally be within the clause where the destination is inside the premises. With regard to the seven securities which were bought by the plaintiffs for their customers and misappropriated by Williamson while on their way to the vaults it is enough to say that they come directly within the words of clause 2, for they were "misappropriated .... by the fraud of their officer .... whilst in transit .... in the hands of their officer." Then if the underwriters are liable on the policy, their liability is not confined to 20,000*l.*, for the liability is only so limited by the proviso "in respect of any one loss," and here there were forty-one separate losses—not one loss. There was a separate loss on each day that any parcel of securities was stolen; and it makes no difference that all the losses were discovered at the same time. The counterclaim cannot be supported for the money was not paid under any mistake of fact. The underwriters paid on the recommendation of their advisers, and even if that advice was wrong still there was no mistake as to any fact.

MacKinnon K.C. and *J. G. Archibald* for the defendant. The underwriters are not liable at all, the loss is not covered by either of the two clauses of the policy. It is not within clause 1, for the words "by them" must be read with "believed" as well as with "supposed," and the plaintiffs knew that the securities had left their premises before the date of the policy. Nor is it within clause 2, and for two reasons: first, the words "securities of the description above specified" refer not to "bonds debentures etc." generally, but to such bonds debentures etc. as "now are or are by them supposed or believed to be . . . . upon their own premises." The latter words form part of the description, and therefore the reason for excluding the loss from clause 1 also applies to exclude it from clause 2. Secondly, the securities which were fraudulently withdrawn from the vaults were never in transit between two "places." One of the two termini of such a transit must be outside the premises, and here for all that appears to the contrary the only transit contemplated by the vault clerk when he handed the securities to Williamson was from the vaults to the reception room. The case of the seven securities, items 19, 27, 29, 30, 32, 33, and 35 in the particulars of claim stand upon the same footing, for the probability is that they were delivered to the plaintiffs upon their premises, and the onus was upon the plaintiffs to show the contrary. But if it be assumed that the loss is covered by the policy and that the underwriters are liable, their liability is limited to the 20,000*l.* which has been paid. The policy is not against losses sustained within the twelve months but against losses which the assured may within the twelve months discover that they have sustained. Here all the defalcations were discovered at one and the same time. There being only one discovery there was only "one loss" within the meaning of the proviso. The defendant is entitled to recover on the counterclaim. No doubt money paid under a mistake as to a general principle of law cannot be recovered back, but a mistake as to the private rights of the parties, especially where those rights arise under so obscure a document as this policy, is a mistake not of law but of fact.

Wright K.C. in reply. The "description above specified" in clause 2 refers only to the kinds of securities specified in clause 1, apart from the condition of their being on or being supposed to be on the premises. To import the limiting conditions of clause 1 into clause 2 would exclude from the policy a loss occurring while the securities were in transit to the plaintiffs' premises from a place outside, which can never have been intended.

Cur. adv. vult.

Nov. 21. ROCHE J. read the following judgment. The plaintiff company was the assured under a policy of insurance dated September 30, 1916, of which the defendant was one of the underwriters. The claim in the action is for payment of a loss under the policy. There is a counterclaim for repayment of moneys paid under a mistake of fact. [He then stated the facts as above set out and proceeded as follows:] The points in issue between the parties may be conveniently dealt with under the following four heads, (1.) Liability. (2.) Extent or limit of liability. (3.) Right of counterclaim. (4.) A few items of claim involving separate considerations.

As to (1.) the policy set out the perils or contingencies covered in two clauses as follows. [He read clauses 1 and 2 of the policy.] The first may perhaps conveniently and merely for the purposes of the present case be styled the safe deposit clause, and the second the transit clause. The plaintiff company's case was based on both these clauses, though mainly on the second. As to the safe deposit clause it was said and truly that the clause covered not only securities which were in fact in safe deposit at the date of the policy, but securities which were believed to be so at that date. It was further argued that if this belief existed in any party to the transaction, in the present case the customer, the clause applied. In my view this argument is wrong. I hold that the words "by them" which precede the word "supposed" govern also the word "believed," and that if the claim rested only on this clause it would fail.

The main stress of the argument for the plaintiff company was rested on the transit clause, and it was said that it precisely covered what happened—namely, Williamson's failure to do what he pretended he was doing and had done—namely, take or transmit the securities to their customers. Mr. MacKinnon's

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admirable argument for the defendants on this clause may be summarized under two main heads: (*a*) In the language of the clause it was submitted that the phrase "securities of the description above specified" brought into the description the whole of the preceding clause down to the word "being," and that accordingly an essential of a loss under the policy was that the securities should at the date of the policy at least have been supposed to be on deposit. There is much to be said for this submission, but on the whole I think it is not correct. The words "of the description above specified" are I think inapt to cover a stipulation as to local position. Further I think the reason of the thing is against the submission. As Mr. Wright pointed out to adopt it would be to suppose that it was intended not to include any cases of transit to the plaintiff company from either customers or brokers, although such transit might be carried out by the agency of the plaintiff company's servants. (*b*) On the facts of the case it was submitted that there was no transit; that all that happened was that Williamson got the securities out of the vaults by fraud and then and there embezzled or misappropriated them. It was further said that there was no proof that there was even a pretended transit: that on the evidence customers often if not most commonly called or sent for securities, and that taking the securities from the vaults to the rooms where customers were received was not a transit within the meaning of the clause in the policy. The reply made to this was that the securities passed into the ambit of clause 2 when they left the vaults; that when the withdrawal cards were honoured the securities were delivered into the hands of a particular person, Williamson, for a transit to the customers; that while it was correct to say that Williamson intended no such transit nevertheless part of his fraud was to pretend to be about to take or deliver them to the customers, and it was not and could not be completed without such a pretence. It was further said that it was a matter of accident whether when particular securities left the vaults they were delivered to the customers or their order outside the plaintiff company's building or inside of it after a transit which in the latter case would be intramural only, to adopt a phrase supplied by Mr. Stuart Bevan. It was said that the risk contemplated by this clause was one of movement which might begin from any place including a place on the company's premises and which in this case began at the vaults. I have hesitated as to which of these views ought to prevail but upon the whole I think the balance of argument is on the side of the defendant. I do not however adopt the view that Williamson's intention is conclusive of the matter, or that the fraud and loss were consummated when the securities left the vaults. But I cannot regard the movement of securities from the vaults to another part of the building as a transit within the meaning of clause 2, and whilst that movement is going on I regard them as still covered by clause 1 and not covered by clause 2 of this policy. Of course there might be a case where it was established by evidence that a transit began from the vaults as it might begin from any other part of the building but there was and could be no evidence of any such transit in the present case. I hold that to constitute a transit within the meaning of clause 2 it must be between distinct houses or places and that a transit which is intramural only is not covered. I do not regard the vaults and Williamson's office or the customer's reception rooms as distinct "places" within the meaning of the clause. For these reasons I hold that the plaintiffs' claim fails.

As to (2). Extent or limit of liability. Having regard to my decision on the first point this topic is not material for the purposes of my own decision, but it is perhaps right as it has been fully argued and as obviously this case may go elsewhere that I should indicate my view particularly with regard to the facts. Upon the evidence and particularly having regard to the intervals of time which elapsed between each of the fraudulent abstractions of securities made the subject of the several items of claim I should certainly hold that there were forty-one acts of fraud or embezzlement and forty-one losses. Nevertheless it was contended for the defendant that the underwriters were only liable for or up to 20,000*l.* until one loss had so materialised as to be discovered. I do

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not agree with this view. The language of the policy and of the proviso contained therein would lead me to the opposite conclusion.

(3.) As to the counterclaim I find the facts to be as follows: Before the sum of 20,000*l.* in question was paid the plaintiff company had by writing and by interviews of its officers and lawyers with the lawyers and accountants acting for underwriters in the United States of America given all possible information about the losses in the clearest and the most candid fashion, and I am satisfied that the gentlemen acting for the underwriters knew every relevant fact about the case when they reported to and advised the underwriters in this country. The defendant was leading underwriter on the policy. He did not personally deal with the settlement but left it to his representative Mr. Nicholl who was called as a witness. I find that Mr. Nicholl's attitude was to deal with questions of policy and to trust his highly competent professional advisers in the United States to investigate and report on the facts and to follow their reports and advice unless, in his judgment, such action was impolitic. He said he did not read all the materials sent to this country from the United States because he preferred, as I think very naturally, to trust his advisers and particularly the eminent firm of lawyers acting for underwriters to form a sound judgment on the facts and the law.

Only one material letter to underwriters from Messrs. Harrington, Bigham and Englar, the lawyers in question, was before me. For the others privilege had been claimed. By their letter dated May 1, 1918, Messrs. Harrington, Bigham and Englar recommended for consideration a proposal that underwriters should, upon certain terms, pay the sum of 20,000*l.* said to be due. That recommendation was considered and acted upon and 20,000*l.* was paid. The counterclaim alleges that it was paid under a mistake of fact—namely, that the securities in respect of the loss of which the plaintiffs claimed were securities covered by the policy. As I am not satisfied that there was any mistake either as to the securities or as to the circumstances of the loss, and indeed, if that is material, am satisfied to the contrary, I can only suppose, and indeed I was so informed by defendants, that the underwriters and their advisers then took a different view of the meaning and effect of the policy itself to that which they now put forward and which I have upheld. I for one feel no surprise that they did so, and whether they were mistaken depends not so much upon my decision as upon the view of the tribunal which ultimately disposes of this case, but I hold that their mistake at all events is not a mistake of fact. Further the plaintiff company having at that time a claim for a year's interest agreed to give up such claim to the extent of the interest on 20,000*l.* if they received payment of such sum. In my judgment that compromise or agreement constituted a good and binding agreement, was executed, and cannot be reopened. For the defendant the authority of *Foakes* v. *Beer* (1) was invoked in this connection as showing that the alleged agreement was nudum pactum. But no authority was adduced which extended the principle laid down in *Foakes* v. *Beer* (1) to a case where a party having an unliquidated claim or claims agrees in consideration of the satisfaction of one of such claims or part of it to give up the other or part of the other of such claims. Nor was an authority adduced which showed that even had the agreement been nudum pactum money paid thereunder could be recovered as money received to the use of the person who paid it. I therefore dismiss the counterclaim.

(4.) As to the items, numbers 19, 27, 29, 30, 32, 33 and 35, I see no reason to distinguish the securities falling thereunder from the rest of the claim either favourably or adversely to the plaintiff company. The fact seems to be that these securities were supposed to have come on to the plaintiffs' premises for delivery to customers though not to have reached the vaults. There Williamson misappropriated them. In these circumstances I find that the claim as to these items depends upon the considerations discussed under head (1.) and accordingly fails.

The result is that the defendant must have judgment on the claim with costs and the plaintiff company must have judgment on the counterclaim with costs.

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(1) (1884) 9 App. Cas. 605.

Judgment for defendant on the claim and for the plaintiffs on the counterclaim.

Solicitors for the plaintiffs : *Paines, Blyth & Huxtable.*
Solicitors for the defendant : *Parker, Garrett & Co.*

J. F. C.

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Nov. 28.

PLUMMER AND JOHN *v.* DAVID.

Landlord and Tenant—Expiry of Tenant's Term—Ejectment—Demand of Possession—Lessee—Underlease—Surrender by Lessee of Reversion—Parol Lease by Lessor to New Tenant—Right of New Tenant to sue Underlessee for Rent—Real Property Act, 1845 (8 *&* 9 *Vict. c.* 106), *s.* 9—*Landlord and Tenant Act,* 1730 (4 *Geo.* 2, *c.* 28), *s.* 6.

Where a tenant's term is determined by notice to quit a demand of possession is not necessary before bringing an action for the recovery of possession.

Sect. 9 of the Real Property Act, 1845 (1), provides that "When the reversion expectant on a lease . . . . shall be surrendered or merge, the estate which shall for the time being confer as against the tenant under the same lease the next vested right to the same tenements or hereditaments, shall, to the extent and for the purpose of preserving such incidents to, and obligations on, the same reversion, as, but for the surrender or merger thereof, would have subsisted, be deemed the reversion expectant on the same lease."

The tenant of a farm underlet it to the defendant on a yearly tenancy. He subsequently gave the defendant notice to quit. During the currency of the notice he, by a parol arrangement with the owner of the farm and the plaintiff, surrendered his reversion to the owner, who thereupon and as part of the same transaction granted to the plaintiff by parol a new tenancy from year to year to commence immediately and to run concurrently with, but subject to, the unexpired portion of the defendant's term. On the expiry of the notice to quit the defendant's rent was in arrear:—

Held, that by virtue of the above section the plaintiff upon the grant to him of the new tenancy became entitled to the reversion expectant on the defendant's term notwithstanding that the grant was by parol, and was consequently entitled to sue the defendant for the rent.

Held, also, that the plaintiff was entitled to recover the rent by virtue of s. 6 of the Landlord and Tenant Act, 1730, which provides that "in case any lease shall be duly surrendered in order to be renewed and a new lease made . . . . every person . . . . in whom any estate for life

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(1) Described as "efficient though somewhat crabbed" in Joshua Williams on Real Property, 22nd ed.' p. 346.

> or lives or for years shall from time to time be vested by virtue of such new lease . . . . shall be entitled to the rents" payable under any underleases "and have like remedy for recovery thereof . . . . as if the original leases, out of which the respective underleases are derived, had been still kept on foot and continued."

TRIAL OF ACTION before Lush J.

The following statement of the facts is taken from the judgment :—

"This action was brought to recover possession of a farm called Trenos Ganol Farm in Glamorganshire, and a claim was added for rent and mesne profits. There were two plaintiffs, the second plaintiff, Evan John, having been added after the writ was issued. The contention for the defendant that was raised at the hearing before me was that neither of the plaintiffs was entitled in the events that had happened to maintain the action. The facts were as follows: Several years ago the Rev. John Williams, the owner of the farm, whom I will call "the owner," let it to Plummer on a yearly tenancy commencing at Lady Day. There was no written agreement. In 1915 Plummer sublet the farm to the defendant, also on a yearly tenancy, commencing at Lady Day at a yearly rent of £38, payable half yearly, the tenancy being determinable by twelve months' notice by either party. This was confirmed by a written agreement dated May 24, 1917. The defendant's position, as Mr. Foà rightly said, was that of a sub-tenant and not that of an assignee. Plummer did not part or purport to part with the whole of his interest. He had the right by a proper notice to quit to determine the defendant's tenancy. He gave notice shortly before Lady Day, 1918, the notice expiring on March 25, 1919. Soon afterwards, in May, 1918, Plummer was desirous of transferring his interest in the farm to the plaintiff, Evan John. Instead of his assigning his term to John it was verbally agreed between them and the owner that John should become yearly tenant to the owner on the same terms as those on which Plummer had held the farm, and this agreement was duly acted on. The defendant still continued to pay rent to Plummer, at least he paid the next half-year's rent, and Plummer paid it over to John. John paid his rent to the owner. There was no attornment by

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the defendant to Evan John. On March 25, 1919, Plummer and an agent of Evan John demanded possession of the farm on behalf of the latter. The defendant refused to give it up, and the action was brought, originally by Plummer. At a later stage John was joined as co-plaintiff."

Foà for the plaintiffs. It is admitted that Plummer having surrendered his interest in the farm by the arrangement entered into between Williams, John and himself in May, 1918, had no title when the writ was issued in this action and was therefore wrongly made a plaintiff. But John can sue both for possession of the farm and for the rent, notwithstanding that the demise to him was by parol only. The defendant's underlease expired with the notice to quit at Lady Day, 1919, and John, as being then the person entitled to actual possession, was the proper party to sue in ejectment: Cole on Ejectment, p. 66. He is also the proper party to sue for the arrears of rent. The tenancy granted to him by Williams was the "estate" which conferred as against the defendant "the next vested right" to the farm within the meaning of s. 9 of the Real Property Act, 1845. That section applies to estates which are created by parol as well as to estates created by deed.

A. T. James for the defendant. First, the demand of possession made on March 25, 1919, was made a day too soon, as the defendant was entitled to retain possession until the expiration of that day. Secondly, the notice to quit given by Plummer could not enure for the benefit of John, who did not claim directly under Plummer: Cole on Ejectment, p. 35. Therefore John could not sue for recovery of possession. Thirdly, John could not sue for the rent, for rent is incident to the reversion, and John never became entitled to the reversion expectant on the defendant's tenancy. There was no attornment by the defendant to him, and, as John's tenancy was created by parol, the statute of 4 Anne, c. 16, s. 9, dispensing with the necessity of attornments does not apply. The only person entitled to sue was Williams. [He referred to *Horn* v. *Beard* (1) and *Cole* v. *Kelly*. (2)]

(1) [1912] 3 K. B. 181.

(2) (1919) 36 Times L. R. 36.

Foà in reply. If Williams was the proper plaintiff he is willing to be added as a party to the action. But it is contended that it is not necessary, and that John is the proper plaintiff. There is no question of the notice to quit enuring for John's benefit. The notice, having been duly given, upon its expiry brought the defendant's tenancy to an end. He then became liable to ejectment, and the only question left was as to the proper party to enforce that remedy. That party was John, who was entitled to immediate possession at the date of the writ. As regards the objection that the demand of possession was too soon it is enough to say that no such demand was necessary at all: Cole on Ejectment, p. 58.

Cur. adv. vult.

Nov. 28. Lush J., after stating the facts as above set out, proceeded as follows: The first point taken before me at the hearing was that the demand for possession was made a day too soon. It was. The defendant was not bound to give up possession until March 26. But it was quite immaterial. No demand is necessary in the case of a tenant whose term has expired by notice to quit. His duty is to give up possession. The case is quite different from that of a tenant at will, where the will has to be determined. The other points taken were that, as Plummer had not assigned his reversion to John, John could not take advantage of the notice to quit, and sue for possession and for rent. He was not, it was said, possessed of the reversion expectant on the determination of the defendant's interest. Only a successor in title, it was contended, of the lessor who gave the notice to quit could sue when the notice expired. Mr. Foà, while disputing the correctness of this proposition, asked for leave to amend by adding as plaintiff the owner, whose written consent was produced. I said I would consider the application, but that if I held it was necessary and allowed it it would only be on payment of costs, as the defendant would have succeeded as this action was constituted up to the hearing. I am of opinion that it is not necessary to join the owner, and that the plaintiff John is entitled to maintain the action. There is no ground for saying that only the successor in title of a lessor who gives notice to quit can take advantage of it and sue for possession. If a tenant for life were to create a valid tenancy from year to year and gave notice to quit, and died before it expired, the remainderman could sue for possession. And if a lessee, who has sublet the demised premises as in this case, surrenders his lease to the owner, the head lessor, while the notice to quit is maturing, the head lessor on the notice to quit expiring can sue for possession, assuming that he has not parted with his rights to another. The sublessee who holds over is a trespasser and has no answer to a claim for possession by the owner. If on the other hand the head lessor has parted with the immediate right to possession to another person, the latter is the person entitled to bring the action. So far as the right to possession is concerned the case is free from difficulty. The effect of the agreement of May, 1918, was that Plummer's tenancy was surrendered by operation of law, and a present immediate estate passed to Evan John, subject to the existing yearly tenancy of the defendant which was in course of coming to an end at Lady Day, 1919. The surrender by Plummer of his term did not operate to determine the subtenancy, and a present estate subject to that sub-tenancy was clearly intended to, and did, pass to Evan John. But in truth Evan John became entitled to sue for the arrears of rent and to enforce all the rights which Plummer would have had if he had not surrendered his term. He is in the position of an assignee of Plummer's reversion. If no new tenancy had been created by the owner when Plummer surrendered the owner would have been deemed to be possessed of the reversion by virtue of the Real Property Act, 1845 (8 & 9 Vict. c. 106), s. 9, which says that " when the reversion expectant on a lease . . . . shall . . . . be surrendered or merge, the estate which shall for the time being confer as against the tenant under the same lease the next vested right to the same tenements or hereditaments, shall, to the extent and for the purpose of preserving such incidents to, and obligations on, the same reversion, as, but for the surrender or merger thereof, would have subsisted, be deemed the reversion expectant on the same lease." As the owner granted a present new tenancy to Evan John as part of the arrangement between himself, Evan John and Plummer, the new tenant took over the owner's rights. I think that the same result would have followed from the Landlord and Tenant Act, 1730 (4 Geo. 2, c. 28, s. 6). That section says that "Whereas many persons hold considerable estates by leases for lives or years, and lease out the same in parcels to several undertenants: and whereas many of those leases cannot by law be renewed without a surrender of all the underleases derived out of the same . . . . be it enacted that in case any lease shall be duly surrendered in order to be renewed, and a new lease made and executed by the chief landlord . . . . the same new lease shall without a surrender of all or any the underleases be as good and valid to all intents and purposes as if all the underleases derived thereout had been likewise surrendered at or before the taking of such new lease; and . . . . every person . . . . in whom any estate for life or lives or for years, shall from time to time be vested by virtue of such new lease . . . . shall be entitled to the rents, covenants and duties, and have like remedy for recovery thereof . . . . as if the original leases, out of which the respective underleases are derived, had been still kept on foot and continued." It was I think decided in *Cousins* v. *Phillips* (1) that a new tenant to whom a lease is granted on the surrender of an existing lease is in the same position as the old lessee to whom a new lease is granted by way of renewal. The result is that the plaintiff John must have judgment for possession and for mesne profits and for the arrears of rent.

Judgment for the plaintiff John.

Solicitors for the plaintiffs: *Waterhouse & Co., for Lewis & Llewellyn, Bridgend.*

Solicitors for the defendant: *Helder Roberts & Co. for W. R. Davies & Co., Pontypridd.*

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(1) (1865) 3 H. & C. 892.

J. F. C.

1919
Dec. 1.

OWNERS OF SPANISH S.S. SEBASTIAN *v.* DE VIZCAYA.

Shipping—Charterparty—Coal Cargo—Shipment in United States—Prohibition of Export except under Licence—Delay in obtaining Licence—Detention of Ship—Duty of Charterer—Knowledge of Shipowner.

A charterparty dated May 18, 1917, provided that a steamer should proceed to Norfolk, Virginia, and there load a cargo of coal for delivery at Bilbao. On July 9, 1917, the President of the United States issued a Proclamation, which came into force on July 15, prohibiting the export of coal to Spain except under licence from the American Government. On July 11 a company which acted as agents at Norfolk for the charterer and also for the shipowners, applied for a licence for the export of the cargo of coal. The steamer arrived at Norfolk on July 14. The cargo was duly loaded, but the steamer was detained at Norfolk while waiting for the licence which, without default on the part of the agents, was not obtained until August 1. The owners claimed damages from the charterer for the detention of the steamer :—

Held, that as the owners had, through their agents, knowledge at the time the cargo was loaded that it was necessary to obtain an export licence, which might involve delay, the charterer was not liable for the detention of the steamer.

Award in an arbitration stated in the form of a special case.

A charterparty, dated May 18, 1917, and made between the owners of the steamer *Sebastian* and De Vizcaya as charterer, provided that the *Sebastian*, then at Philadelphia, should proceed to Norfolk, Virginia, and there load in a specified time a cargo of coal, and being so loaded should therewith proceed with all possible despatch to Bilbao. By clause 7, inter alia, " restraints of princes and rulers " were " excepted."

On July 9, 1917, the President of the United States of America issued a proclamation whereby it became unlawful to export or ship from, or take out of, the United States of America to (inter alia) Spain certain articles, including coal, except under licence from the American Government. The Proclamation came into force on July 15, 1917.

On July 11 the Proclamation came to the knowledge of the shippers, the Pocahontas Fuel Company, Incorporated, who were acting in the dual capacity of agents for the charterer and agents for the owners. The Pocahontas Company on July 11 made application to the Bureau of Foreign and Domestic

Commerce Division of Export Licences in Washington for the necessary licence to export 15,000 tons of coal to the charterers in steamers then expected to arrive, including the *Sebastian*. That steamer arrived at Norfolk on July 14, and the loading of the coal was completed on July 18 within the time specified in the charterparty. The licence permitting the export of the cargo was not received until August 1, although according to the Bureau of Foreign and Domestic Commerce it had been mailed from Washington some days earlier. The *Sebastian* was detained at Norfolk for 14 days, 23 hours, whilst waiting for the export licence, and in respect of this detention the owners claimed damages from the charterer. The claim was referred to arbitration.

The arbitrators held that the necessary steps to obtain the export licence were taken in due time, and that everything possible was done to obtain the licence with the least possible delay; that the delay in the sailing of the *Sebastian* after the cargo had been shipped was entirely due to the Proclamation and to the delay in the issuing of the licence by the Bureau of Foreign and Domestic Commerce, and was a restraint of princes and rulers within the meaning of clause 7 of the charterparty, and that the charterer was under no liability to the owners in respect thereof.

R. A. Wright K.C. and *G. P. Langton* for the shipowners. The charterer is liable for the detention of the ship. By the charterparty he undertook to load a cargo of coal, and by so doing he impliedly warranted that the cargo was not dangerous in the sense that it was not of such a character as to be likely to cause delay in the sailing of the ship. Illegality per se does not excuse a charterer from loading a cargo: *Mitchell, Cotts & Co.* v. *Steel Brothers & Co.* (1); *Brass* v. *Maitland* (2); *Jacobs, Marcus & Co.* v. *Crédit Lyonnais* (3); *Dunn* v. *Bucknall Brothers* (4); *Bamfield* v. *Goole and Sheffield Transport Co.* (5); *Barker* v. *Hodgson* (6); *Blight* v. *Page.* (7) The restraint of princes exception in this charterparty is not a mutual exception but one which is for the benefit of the shipowners only: *Braemount Steamship Co.* v. *Andrew Weir & Co.* (1); *Barrie* v. *Peruvian Corporation* (2); *In re Newman & Dale Steamship Co. and British & South American Steamship Co.* (3)

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(1) [1916] 2 K. B. 610.
(2) (1856) 26 L. J. (Q. B.) 49.
(3) (1884) 12 Q. B. D. 589.
(4) [1902] 2 K. B. 614.
(5) [1910] 2 K. B. 94.
(6) (1814) 3 M. & S. 267.
(7) (1801) 3 B. & P. 295 n.

MacKinnon K.C. and *Sir Robert Aske* for the charterer. The liability of a charterer to the shipowner for the consequences of loading a dangerous cargo only arises where the danger is known to the charterer and not to the shipowner: *Acatos* v. *Burns.* (4) The doctrine does not apply if at the date when the cargo is tendered for shipment both parties are aware of its dangerous character. In the present case the company which acted as agents for both the shipowners and the charterer knew that it was necessary to obtain an export licence. It may be admitted that there was an implied obligation on the charterer to obtain the licence, but he was not guilty of any default in doing so, and in the circumstances, therefore, the charterer is not liable for the detention of the ship: *Ford* v. *Cotesworth* (5); *Cunningham* v. *Dunn.* (6) In any event the charterer is protected by the restraints of princes exception.

R. A. Wright K.C. replied.

BAILHACHE J. In this case shipowners claim against a charterer for demurrage or damages for the detention of the ship at the port of loading. The arbitrators have found that the detention of the ship was entirely due to the delay of the American authorities in issuing the necessary licence which had to be obtained before the vessel could sail with the cargo of coal loaded under the charterparty. It is said for the shipowners that by reason of the Proclamation of the Government of the United States prohibiting the export of coal to Spain except under licence, a cargo of coal was a dangerous cargo in the sense that it was of such a character as would necessarily cause the ship to be detained at the loading port while the licence was being obtained, whereas it was the duty of the

(1) (1910) 15 Com. Cas. 101.
(2) (1896) 2 Com. Cas. 50.
(3) [1903] 1 K. B. 262.
(4) (1878) 3 Ex. D. 282.
(5) (1870) L. R. 5 Q. B. 544.
(6) (1878) 3 C. P. D. 443.

charterer under the charterparty to load such a cargo as, when loaded, could be carried to the port of delivery without delay.

There have been many cases in which questions have arisen with regard to dangerous cargoes. In some cases the danger has arisen from the nature of the cargo itself, or by reason of the law of contraband, or, as in *Mitchell, Cotts & Co.* v. *Steel Brothers & Co.* (1), where the particular cargo could not be discharged without Government permission. But in all the cases where the charterer has been held liable for the consequences of shipping a dangerous cargo there has been knowledge on the part of the charterer and ignorance on the part of the shipowner of the character of the cargo. On the other hand where both parties agree that a specific cargo shall be shipped, the nature of which is known to both of them, and when the particular difficulty which may arise is also known to both parties at the time the cargo is loaded, the charterer is not liable for any delay which may arise through shipping that particular cargo.

In the present case the same company acted as agents for both the charterer and the shipowners at the port of loading. The disability attaching to the export of coal to Spain was known to the company at the time the cargo was taken on board, and therefore both the shipowners and the charterer had through their agent full knowledge that the cargo which was being loaded was of such a character that it might involve the detention of the ship while the necessary export licence was being obtained. It was the duty of the charterer to obtain the licence without any unnecessary delay, and the arbitrators have found that he did so. In these circumstances it is in my opinion impossible to hold that the consequences of the delay fell upon the charterer rather than upon the shipowners.

It was also contended that the charterer was in any event protected by the exception of restraints of princes and rulers in clause 7 of the charterparty. It was argued for the shipowners that clause 7 was not a mutual clause but one which was for the benefit of the shipowners only. It is however unnecessary for me to express any opinion on this point,

(1) [1916] 2 K. B. 610.

which is one of some difficulty, for I decide the case on the ground that in the circumstances there has been no breach of the charterparty by the charterer.

Award upheld.

Solicitors for shipowners: *William A. Crump & Son, for Gilbert Robertson & Co., Cardiff.*

Solicitors for charterer: *Botterell, Roche & Temperley.*

F. O. R.

[IN THE COURT OF APPEAL.]

C. A.
1919
Dec. 2.

CHAPMAN v. LEACH.

[1919. C. 1020.]

Practice — Discovery — Interrogatories — Defamation — Privilege — Information on which Defamatory Statement founded—Name of Informant —Bona fides.

In an action of slander in which the defence of privilege was pleaded the plaintiff sought to administer an interrogatory to the defendant, asking him what information he had before speaking the words complained of which induced him to believe that the words were true, and what inquiries he made before speaking and publishing the words to ascertain whether they were true or not, and "when, where, and of whom were such inquiries made?" Before action a correspondence passed in which the plaintiff's solicitors wrote to the defendant asking him to retract the slander and apologize; "at the same time we must ask you to give us the name of your informant and furnish us with such evidence as will enable our client to bring an action against him. If you do that our client will be satisfied so far as you are concerned, but if you are not prepared to comply with our request in every particular please furnish us with the name of a solicitor who will accept service of a writ on your behalf." In reply, the defendant wrote that he had seen the gentleman who gave him the verbal information, and found that he (the defendant) was misinformed, and tendered an apology. The solicitors wrote to the defendant in reply refusing to accept the apology, and stating that they had offered "to let you off, provided you gave us the name of your informant and assisted us in reaching him by your evidence." The present action was thereupon brought. The defendant objected to the interrogatory so far as it asked him "of whom" were such inquiries made, upon the ground that the letters showed that the name of the defendant's informant was not asked for bona fide for the purposes of the action, but to enable the plaintiff to bring an action against him:—

Held, on the assumption that the interrogatory asked the name of the informant, that the correspondence merely showed that the plaintiff did not desire to bring an action against the defendant if the latter would disclose the name of his informant, and that it did not show that the plaintiff was going to bring an action for the purpose of obtaining the name of the informant so that he might sue him, and that therefore the interrogatory asking the name of the informant was admissible.

Edmondson v. *Birch & Co.* [1905] 2 K. B. 523 distinguished.

Held, secondly, that the interrogatory did not in form ask for the name of the informant, and it could not be objected to on the ground that the plaintiff might be able thereby indirectly to obtain the name, unless it was shown that the question in that form was not put bona fide.

APPEAL from an order made by Salter J. in chambers.

The action was to recover damages for slander. The statement of claim was as follows: "1. The plaintiff is and was at the date hereinafter mentioned a merchant shipper and contractor in the city of London. He was an original member of the London Shipping Exchange which in 1903 was amalgamated with the Baltic, whereupon he became a member of the Baltic and so continued till 1916, when he resigned his membership, and is chairman of the coal trade section and a member of the council of the London Chamber of Commerce and a member of the London Court of Arbitration. 2. On the 28th day of April, 1919, the defendant falsely and maliciously spoke and published of and concerning the plaintiff in relation to his said business to C. Lacey Bathurst . . . . the words following, that is to say: 'He' (meaning the plaintiff) 'has been expelled from the Baltic.'" Paragraph 4 contained the innuendo. In the defence the defendant admitted the publication of the words complained of but did not admit the other allegations in the statement of claim, and in paragraph 5 he pleaded that he spoke and published the words bona fide and without malice under such circumstances as rendered the occasion privileged.

The plaintiff applied for leave to administer to the defendant the following interrogatory (amongst others): "What information, if any, had you before speaking the words set out in paragraph 2 of the statement of claim which induced you to believe that the said words were true, and what steps and/or precautions and/or inquiries, if any, did you take and/or make before speaking and publishing the said words to ascertain whether they were true or not? When, where, *and of whom* were such inquiries made? Were such information and/or inquiries oral or in writing, and if the latter identify the documents? Did you publish the said words as the result of any such inquiries?" A correspondence had taken place before action of which the following were the material letters: On May 19, 1919, the plaintiff's solicitors wrote to the defendant: "Dear Sir, We are instructed by our client Mr. John Chapman to communicate with you in reference to a slander concerning him which you uttered on or about the 28th April last to a mutual friend Mr. Bathurst. The statement complained of was that our client had been expelled from the 'Baltic.' This allegation is wholly untrue, and we are instructed to call upon you to retract the slander and apologize. At the same time we must ask you to give us the name of your informant and furnish us with such evidence as will enable our client to bring an action against him. If you do that our client will be satisfied so far as you are concerned, but if you are not prepared to comply with our request in every particular please furnish us with the name of a solicitor who will accept service of a writ on your behalf." On May 21 the defendant replied: "Dear Sirs, I have seen the gentleman who gave me the verbal information about Mr. Chapman's affairs and now find I was misinformed about the Baltic. I understand that Mr. Chapman resigned his membership there, and I am sorry that there has been any misunderstanding on this point, and now tender my apologies to Mr. Chapman." The plaintiff's solicitors replied on May 22: "Dear Sir, We have your letter of yesterday's date and can scarcely believe that you appreciate the seriousness of the matter. You have uttered in respect of our client the most serious slander that could be uttered concerning him in his profession, viz., that he has been expelled from the 'Baltic.' This slander as a matter of fact as you perfectly well know has gone all round Sydenham, and you now calmly say that you find you were misinformed. We offered on behalf of our client to let you off, provided you gave us the name of your informant and assisted us in reaching him by your evidence. To our mind you add fuel to the fire when you purport to express sorrow for what you now call a misunderstanding. Our client is not prepared to accept the apology which you make in your letter under the circumstances, and we are issuing a writ for slander. . . . ." The writ was accordingly issued on May 24.

The defendant objected to that part of the interrogatory (printed above in italics) "and of whom," upon the ground that it was not put bona fide for the purpose of the action, but merely to enable the plaintiff to bring an action against the person who gave the information: *Edmondson* v. *Birch & Co.* (1) The master allowed the interrogatory. On appeal the judge, on the authority of the above-mentioned case, struck out the words objected to, "and from whom," the sentence as amended running: "When and where were such inquiries made?" and allowed the interrogatory as so altered. The plaintiff appealed.

E. W. Hansell for the plaintiff. The defence of privileged occasion being raised the plaintiff has to be prepared to prove malice. An important factor in the question as to whether the defendant was actuated by malice is who was the defendant's informant: *White & Co.* v. *Credit Reform Association.* (2) An exception to that general rule was laid down in *Edmondson* v. *Birch & Co.* (1) that where the interrogatory or the part objected to is not put bona fide for the purposes of the pending action, but with an illegitimate motive for the purpose of enabling the plaintiff to bring an action against some person other than the defendant, the question ought not to be allowed. But the facts in that case were very special, and the Court came to the conclusion on the correspondence that the object of the plaintiff was to obtain discovery for the purpose of bringing another action. That cannot be said here. The corre-

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(1) [1905] 2 K. B. 523.

(2) [1905] 1 K. B. 653.

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spondence shows that the plaintiff merely gave the defendant the option of disclosing the name of his informant, and offered, if he did so, to be satisfied with bringing an action against the informant as the real author of the slander, but the defendant refused to accept this offer. The order of the master was right.

[BANKES L.J. The interrogatory does not ask the name of the informant, but merely of whom the inquiries were made.]

The interrogatory was intended to ask the name of the informant, but if it does not, then clearly the question is admissible.

Sir Hugh Fraser for the defendant. The case is exactly within the decision in *Edmondson* v. *Birch & Co.* (1) As Romer L.J. said: "Undoubtedly an interrogatory of that kind is one which ought to be regarded with some caution and jealousy." And Mathew L.J. expressed the same view: "I share the view expressed by Romer L.J. as to the danger of allowing an interrogatory of this kind, where there is reason to think that it is not administered in perfect good faith." The letters of May 19 and 22 show that the object of getting the name of the informant is to "enable" the plaintiff "to bring an action against him" and to do so with the defendant's assistance. The question is not put bona fide for the purpose of furnishing evidence of malice and so to rebut the plea of privilege. The order of the learned judge was right. Even if the interrogatory does not directly ask the name of the informant, it does so indirectly, and the objection is equally applicable.

Hansell in reply.

BANKES L.J. I think that the order of the master was right on two grounds, one of which does not appear to have been dealt with or referred to before either the master or the learned judge. In the first place I assume that the interrogatory asks from whom the information was derived. It is said that having regard to the letters the interro-

(1) [1905] 2 K. B. 523, 526, 527.

gatory is not put bona fide for the purpose of testing the defence of privilege, but is really put for the purpose of obtaining the name of the person who gave the information, so as to bring another action against him; and reliance is placed on the decision in *Edmondson* v. *Birch & Co.* (1) But the facts in that case were very different from those in this case. There what the plaintiff said before action in effect was this: I do not want to bring an action against you, the defendants, but I am so determined to bring an action against the real author of this libel that I shall bring an action against you so as to discover the name of that person unless you give it to me, and in that way to procure evidence on which I can take action against the person whom I desire to sue. In the present case the plaintiff before action said to the defendant, as is often said: I do not want to bring actions against two persons; I am determined to bring an action against somebody in respect of this slander, but I do not want to bring an action against you if you will tell me the name of the person who made the statement to you. He does not say that in any case he will bring an action against the present defendant for the purpose of discovering the name of the person who gave the information. I think that there is a clear distinction between the facts of the present case and those in *Edmondson* v. *Birch & Co.* (1) In my opinion the master took the right view, and his view is to be preferred to that of the learned judge.

I think however that there is another ground upon which this appeal may be decided. When one looks at the interrogatory carefully it is not an interrogatory in the ordinary form asking for the name of the person from whom the information was derived. It is the third interrogatory which is usually put—namely, Did you make any inquiries to ascertain if the original information you obtained was accurate, and if so from whom did you make those inquiries? In the ordinary case that interrogatory would be free from the objection that was taken in *Edmondson* v. *Birch & Co.* (1), and which is taken here. It is said however that the facts are such

(1) [1905] 2 K. B. 523, 526, 527.

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that, though the interrogatory is put in that form the plaintiff will be able to obtain the same information indirectly as if he asked from whom the information was obtained. I do not think that that is a sufficient objection unless it is clearly shown that the question, put in that form, is not put bona fide.

I think that the master took the right view of the letters, and was right in deciding that the interrogatory, as originally drawn, was admissible; and I think that on the above grounds the appeal should be allowed, and the interrogatory admitted in the form in which it was originally allowed.

SCRUTTON L.J. I have had some doubt, but on consideration I have come to the conclusion that the appeal should be allowed for the reasons given by Bankes L.J. which I do not propose to repeat.

Appeal allowed.

Solicitors for plaintiff: *Cave, Darch, Crickmay & Rundle.*
Solicitors for defendant: *Druces & Attlee.*

W. F. B.

[IN THE COURT OF APPEAL.]

C. A.
1919
June 24, 25;
July 11.

In re AN ARBITRATION BETWEEN ELLIS AND THE RUISLIP-NORTHWOOD URBAN DISTRICT COUNCIL.

Local Government—Town Planning—Scheme—Compensation—Building Line—Space about Buildings—By-Law—Housing, Town Planning, &c., Act, 1909 (9 *Edw.* 7, *c.* 44), *s.* 59—*Public Health* (*Buildings in Streets*) *Act,* 1888 (51 *&* 52 *Vict. c.* 52), *s.* 3.

By s. 59, sub-s. 1, of the Housing, Town Planning, &c., Act, 1909, where property is alleged to be injuriously affected by reason of any provisions contained in a town planning scheme, no compensation shall be paid in respect thereof if or so far as the provisions are such as would have been enforceable if they had been contained in by-laws made by the local authority.

By sub-s. 2 property shall not be deemed to be injuriously affected by reason of the making of any provisions inserted in a town planning scheme which, with a view to securing the amenity of the area included in the scheme or any part thereof, "prescribe the space about buildings. . . . ."

A town planning scheme contained a clause prescribing a building line beyond which no buildings should be erected. A landowner, being thereby deprived of the use for building purposes of a strip of land claimed compensation:—

Held, by Bankes L.J. and Eve J. (Scrutton L.J. dissenting):

(1.) That the clause prescribing a building line was not a provision which prescribed the space about buildings within the meaning of sub-s. 2, and that therefore the claim was not barred by that sub-section.

(2.) That the claim was not barred by sub-s. 1 because the local authority had no express power to make a building line, and could not justify the clause as an exercise of their power to make a by-law regulating the space about buildings; also, per Bankes L.J., because there was no evidence that a by-law having the same effect as the clause would be reasonable.

Decision of Bailhache J. reversed.

APPEAL from the decision of Bailhache J. upon an award in the form of a special case stated in an arbitration under s. 58, sub-s. 4, of the Housing, Town Planning, &c., Act, 1909. The claimant in the arbitration, who was the appellant in this Court, claimed compensation from the respondents, the Urban District Council of Ruislip-Northwood, in respect of property of which he was the owner and which he alleged to have been injuriously affected by the making of a town planning scheme under Part II. of the Act.

The material paragraphs of the special case, or the substance thereof, will be found set forth below. The following statement indicates the points of law raised by this appeal.

The town planning scheme laid down a building line drawn from a Police Station north of the claimant's land to a building, referred to in the case as the Southern Shop, south of the claimant's land, beyond which line buildings were not to be erected.

The claimant complained that in consequence of this building line he was prevented from building on a strip of land about 300 feet in length and 7 feet in depth.

The Council contended that any claim to compensation was excluded by s. 59, sub-ss. 1 and 2, of the Housing, Town Planning, &c., Act, 1909 (1); by sub-s. 1, inasmuch as the provision prescribing a building line was one which would have been enforceable if it had been contained in a by-law made by the Council; and by sub-s. 2, inasmuch as the provision was one which, with a view to securing the amenity of the area included in the scheme, prescribed the space about buildings.

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(1) Housing, Town Planning, &c., Act, 1909 (9 Edw. 7, c. 44):—

Sect. 58 (1.) "Any person whose property is injuriously affected by the making of a town planning scheme shall, if he makes a claim for the purpose within the time (if any) limited by the scheme, not being less than three months after the date when notice of the approval of the scheme is published in the manner prescribed by regulations made by the Local Government Board, be entitled to obtain compensation in respect thereof from the responsible authority.

"(2.) A person shall not be entitled to obtain compensation under this section on account of any building erected on, or contract made or other thing done with respect to, land included in a scheme, after the time at which the application for authority to prepare the scheme was made, or after such other time as the Local Government Board may fix for the purpose:

"Provided that this provision shall not apply as respects any work done before the date of the approval of the scheme for the purpose of finishing a building begun or of carrying out a contract entered into before the application was made.

"59 (1.) Where property is alleged to be injuriously affected by reason of any provisions contained in a town planning scheme, no compensation shall be paid in respect thereof if or so far as the provisions are such as would have been enforceable if they had been contained in by-laws made by the local authority.

"(2.) Property shall not be deemed to be injuriously affected by reason of the making of any provisions inserted in a town planning scheme, which, with a view to securing the amenity of the area included in the scheme or any part thereof, prescribe the space about buildings or limit the number of buildings to be erected, or prescribe the height or character of buildings, and which the Local Government Board, having regard to the nature and situation of the land affected by the provisions, consider reasonable for the purpose."

Bailhache J. held that the claim was barred by s. 59, sub-s. 2, and inclined to the view that it was barred by sub-s. 1 also. He therefore upheld the award of the arbitrator made in favour of the Council.

The claimant appealed. The view taken by this Court makes it necessary to set out the special case at some length. The following are in substance the material paragraphs thereof:—

3. On January 16, 1911, a resolution was passed by the Council that application should be made to the Local Government Board for authority to prepare a scheme under the Act. A copy of the resolution was sent to the Board on January 17. Authority was granted. A scheme was prepared by the Council, and was subsequently on September 17, 1914, approved with modifications by the Board.

8, 9 and 10. The claimant was the owner in fee simple in possession free from incumbrances of a plot of land abutting on the High Street, Ruislip, 400 feet long and from 23 feet 3 inches to 50 feet wide, bounded on the west by the High Street and on the east by a cemetery. The nearest building north of the plot was a Police Station in the High Street distant about 60 feet. The nearest building to the south was a shop referred to as the Southern Shop separated from the plot by a road 18 feet 8 inches wide leading to the cemetery.

12. By clause 36 (*a*) of the scheme (which is the first of a series of sections grouped under the heading "Space about buildings including building-lines") it was provided that where a building line was shown upon the map referred to therein in respect of any existing street or proposed new street no building or erection other than boundary walls or fences should be erected or set nearer the street than the building line.

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13. Clause 36 (*b*) of the scheme was as follows: "The Council, by notice in writing to the owner of any building erected since the date of the resolution of the Ruislip-Northwood Council applying to the Board for authority to prepare this scheme, or in course of erection at the date of the approval of this scheme, nearer to a street than the building line so shown"—that is to say, upon the map—"in respect of the street, may require the owner, within a time specified in the notice not being less than two months, to remove, pull down, or alter the building so far as it is nearer to the street than the said building line."

14 (*a*). By their order of September 7, 1914, the Local Government Board, after reciting that clause 36 contained matters mentioned in s. 59, sub-s. 2, of the Act, declared that "having regard to the nature and situation of the land affected by the provisions of clauses 36 to 56 of the scheme" the Board "consider those provisions reasonable so far as they relate to the purpose mentioned in s. 59 of the Act."

The map referred to in the scheme showed a building line running along the claimant's land in a line with the front main wall of the Southern Shop, and about 7 feet behind the front main wall of the Police Station, leaving a strip of about 7 feet along the whole length of the claimant's plot upon which he was by the scheme prohibited from building. The claimant contended that but for the scheme he would have been entitled to build up to the front main wall of the Police Station.

6. The claimant complained (*a*) that in consequence of the restrictions imposed by the scheme and in particular by clause 36 (*b*) he was prevented from building on his land abutting on the High Street, Ruislip, nearer to the street than the building line shown on the map referred to in the scheme, and that he was thus deprived of the use for building purposes of a strip of land fronting on the High Street about 300 feet in length and 7 feet in depth; and (*b*) that he was further rendered liable by clause 36 (*b*) of the scheme to be compelled to set back for a distance of 7 feet four shops already erected on his land in advance of the building line prescribed by the scheme.

17. By s. 157 of the Public Health Act, 1875, an urban authority has power to make by-laws "with respect to the sufficiency of the space about buildings to secure a free circulation of air, and with respect to the ventilation of buildings."

Number 56 of the respondents' by-laws made in pursuance of this section provides that "every person who shall erect a new domestic building shall provide in front of such building an open space, which, measured to the boundary of any lands or buildings or premises immediately opposite, or to the opposite side of any street which may not be less than 24 ft. in width at the point where such building may front thereon, shall throughout the whole line of frontage of such building, extend to a distance of 24 ft. at the least: such distance being measured in every case at right angles to the external wall of such building which shall front or abut on such open space."

18. By s. 3 of the Public Health (Buildings in Streets) Act, 1888, it shall not be lawful in any urban district without the consent of the urban authority to erect or bring forward any house or building in any street or any part of such house or building beyond the front main wall of the house or building on either side thereof in the same street.

19. The High Street, Ruislip, is a "street" within the meaning of that Act, and, where it bounds the claimant's land, varies in width from 30 feet 1 inch to 33 feet 6 inch. The Southern Shop and the claimant's land are in the same street.

20 and 22. On January 28, 1911, the claimant entered into an agreement with one Thomas Collins, a builder, whereby Thomas Collins agreed to build on the claimant's land and to complete according to plans four houses and shops before January 1, 1912, and four additional houses and shops before January 1, 1913, and eight additional houses and shops before January 1, 1914. A plan marked W. L. C.1 showed the first four of sixteen houses and shops to be erected in High Street in a line with the front main wall of the Police Station. The plan was submitted by Messrs. Nokes & Nokes on behalf of the claimant to the Council on January 19, 1911, and disapproved by them "as not being in compliance with the several statutes and the by-laws and regulations in force in the district."

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23. On February 25, 1911, Messrs. Nokes & Nokes forwarded an amended drain plan of the four houses and shops enclosed with a letter in which they referred to the four shops as "the first four of the sixteen shops to be built on the land known as the Orchard." On March 16, 1911, the Council gave a further notice that the plans had been disapproved on the same grounds. In reply to an inquiry the Clerk to the Council on April 12, 1911, by letter addressed to Thomas Collins's solicitor, informed him that "one of the reasons" was "that the buildings would contravene the provisions of the Public Health (Buildings in Streets) Act, 1888."

24. On May 19, 1911, a further plan was submitted to the Council by one George E. Ellis. This plan, which was marked H. G. 2, showed a single continuous block of sixteen shops which it was proposed to erect on the claimant's land to the line of the Police Station and extending from the northern limit of the land to the road leading to the cemetery. In submitting this plan George E. Ellis was acting both on behalf of Thomas Collins and the claimant.

25. By notice dated June 20, 1911, the Council informed George E. Ellis that the plans of the sixteen shops had been disapproved "as not being in compliance with the several statutes and the by-laws and regulations in force within the district." Correspondence then ensued between the Council and Mr. Pumfrey, acting as solicitor for Thomas Collins, in the course of which the Council in a letter dated November 27, 1911, informed Mr. Pumfrey (i.) that the buildings proposed to be erected in the positions shown in the plans submitted would infringe the provisions of the Public Health (Buildings in Streets) Act, 1888; (ii.) that the block plan submitted was incorrect and the buildings could not be built on the land in the positions shown; (iii.) that by-law No. 114 of the Council's by-laws had been infringed in certain particulars therein set out.

The letter also referred to several other by-laws which it was stated would be infringed if the buildings were erected according to the plans submitted.

26. On December 23, 1911, Thomas Collins died without

having erected on the claimant's land any of the houses mentioned in the agreement of January 28, 1911, and thereupon the claimant re-entered on the land and resumed possession thereof.

27. On January 8, 1912, George E. Ellis resubmitted the plan H. G. 2, together with an amended block plan showing the sixteen shops to be built to the line of the Police Station: and on January 31, 1912, the Council gave notice that the amended plans were disapproved " as not being in compliance with the several statutes and the by-laws and regulations in force within the district."

28 and 29. After the death of Thomas Collins the claimant entered into a verbal agreement with a builder named Walter Hollidge under which Hollidge agreed to erect houses and shops on the claimant's land in accordance with his instructions, and on May 20, 1912, Hollidge, after giving notice to the respondents of his intention, began to erect in accordance with the plans submitted two houses and shops at the northern end of the claimant's land. They did not project beyond the front main wall of the Police Station, which was about 60 ft. distant, but they did project about 7 ft. beyond the front main wall of the Southern Shop, which was about 420 ft. distant from the northern extremity of these erections.

30 and 31. On July 8, 1912, Hollidge was convicted and fined for an offence under s. 3 of the Public Health (Buildings in Streets) Act, 1888, for unlawfully commencing to erect a building in a certain street called " West End Road "—another name for the High Street—Ruislip Village, beyond the front main wall of the house on the south side thereof in the same street without the written consent of the respondents being the urban authority for the district.

36. The arbitrator held (1.) that the claimant was bound by the conviction; (2.) that the conviction did not decide that no building could without the consent of the Council lawfully be erected on any part of the claimant's land in advance of the front main wall of the Southern Shop; but (3.) that it decided that it would be an offence under the Public Health (Buildings in Streets) Act, 1888, to erect on the land without

the Council's consent any building in advance of the front main wall of the Southern Shop if the building formed or was intended to form part of a single continuous block of buildings (such as was shown on plan H. G. 2) which would extend when completed as far as the road leading to the cemetery.

37. It was also contended on behalf of the Council that (apart from the conviction) the building line for the purposes of the Public Health (Buildings in Streets) Act, 1888, was regulated by the front main wall of the Southern Shop, in other words that it was the same as that prescribed by the scheme.

38. The arbitrator found that the front main wall of the Southern Shop did not necessarily regulate the line of any building which it might be proposed to erect on the claimant's land, but that the building line would depend on the distance to which the proposed building would, when completed, extend towards the south. He further found (*a*) "that the front main wall of the Southern Shop regulated the line of any building which it might be proposed to erect on the claimant's land in such a position that it would extend on the south side as far as the road leading to the cemetery or of any house or shop intended to form part of a single continuous block of buildings (such as that shown on plan H. G. 2) which would when completed extend so far, and (*b*) that the Southern Shop would be a shop on one side of any such building or continuous block of buildings which might be erected on the claimant's land in such a position that its southern extremity would extend as far as the road leading to the cemetery."

39 and 40. On January 6, 1913, the claimant submitted to the respondents plans and drawings, marked W. L. C. 4 and 5, of two more shops which he proposed to erect on his land immediately adjoining southwards the two shops the subject-matter of the prosecution. The plans showed the proposed shops in a line with the front main wall of the Police Station and of the two shops already erected. On February 5, 1913, the respondents gave notice to the claimant that the plans were disapproved on the same grounds as before and they also informed the claimant that the proposed buildings would

contravene the provisions of the town planning scheme then being prepared by the respondents.

41. Notwithstanding the notice of disapproval the claimant proceeded to erect the two additional shops in accordance with the plans W. L. C. 4 and W. L. C. 5, and they were in fact completed shortly afterwards. The two additional shops were so erected on the south side of the two shops already erected and immediately adjoining them. The claimant contended that by the erection of the two additional shops he re-established the line of the Police Station as the building line in relation to his property. The Council at no time assented to the erection of the two shops and, although they took no legal proceedings in respect thereof, contended that the erection thereof was in contravention of the Public Health (Buildings in Streets) Act, 1888, and that the two additional shops as well as the first two must be considered to be unlawful.

42. All the four shops which had been erected on the claimant's land were about 7 ft. nearer to the High Street, Ruislip, than the building line shown on the map referred to in the scheme. They were all occupied shortly after their completion.

43. In a letter to the Council dated March 25, 1913, the claimant after referring to H. G. 2 as " the plans for the sixteen shops proposed to be erected in the High Street, Ruislip, submitted for approval to your Council in May 1911 by Mr. T. Collins, my tenant, on his and my behalf, four of which shops are now erected," gave notice that it was his intention to proceed with the remaining twelve of the sixteen shops shown in the said plans, and he enclosed a duplicate plan marked W. L. C. 6 showing that the twelve shops were also intended to be built to the line of the Police Station.

44. The Council objected to the erection of the twelve additional shops on the ground that they did not comply with the by-laws, statutes, and regulations in force within the district, and they also on April 12, 1913, gave the claimant notice that the shops would contravene the provisions of the scheme. Notwithstanding the objection of the Council the

claimant commenced the erection of the twelve shops and built brick piers at intervals to the height of about 4 ft. along the whole length of the frontage which the shops were intended to occupy in a line with the front main wall of the Police Station. These shops were however never completed and no work was done on them after the end of April, 1913. The brick piers were ultimately removed by the claimant pursuant to the agreement of September 21, 1914, more particularly hereinafter referred to.

45. The Council did not at any time give its consent in writing to the erection of any building on the claimant's said land beyond the front main wall of the Southern Shop, but on the contrary consistently refused to give such consent.

46. The claimant never submitted to the Council nor produced at the arbitration any plans of buildings which he proposed to erect on his land to the south of the four shops already erected other than plans of a single block of houses and shops extending as far as the road leading to the cemetery, and he tendered no evidence of damage sustained by him in consequence of the provisions of clause 36 (*a*) of the scheme except on the basis that he had been thereby deprived of the use of a strip of land 7 ft. in depth extending for the whole of the distance from the southern extremity of the four shops to the road leading to the cemetery.

47. Before the date of the arbitration the claimant had erected nothing on his land except the four shops and the brick piers mentioned in para. 44.

7. The claim as finally submitted to the arbitrator was grouped under five heads, of which the following are particulars :—

A. Building land 300 feet frontage worth, without the restrictions of the scheme, a ground rent of 5*s*. per foot lineal, depreciated one-half, 712*l*. 10*s*.

B. Loss of income from the date of application, January, 1911, to the probable date of the award, 525*l*.

C. Loss of value of four shops already erected when set back after the expiration of the agreement with the Council depreciated one-third, deferred until 1926, 720*l*.

D. Estimated cost of setting back and reconstructing the four houses and shops, 800*l.*

E. Claim for contingent loss through reduction of size of rooms in the four shops which when set back would be unlettable under the existing by-laws, 7*l.* 10*s.* per house per annum at 15 years' purchase, deferred 8½ years, 270*l.*

Total, 2707*l.* 10*s.*

48. The Council contended that the claimant was not entitled to any compensation under head B because he had sustained no damage in fact under that head and that nothing could be awarded in respect of damage alleged to have been suffered between the date of the scheme and the making of the award.

51. The erection of none of the four shops was begun till after the date of the Council's application for authority to prepare the scheme and none of the four shops was erected in pursuance of any contract entered into before the date of that application. The Council therefore contended that the claims under heads C, D and E were all barred by s. 58, sub-s. 2, of the Act. In the opinion of the arbitrator this contention was well founded.

52. By a memorandum of agreement dated September 21, 1914, and made between the Council of one part and the claimant of the other part, after reciting the making of the scheme by the Council and the provisions of clause 36 thereof as modified by the Local Government Board, and reciting that there were upon the claimant's lands four shops or buildings nearer to the street known as High Street, Ruislip, than the building line shown on the map referred to in the scheme which buildings had been erected since January 16, 1911, or were, or might be, in course of erection at the date of the approval of the scheme by the Local Government Board, and reciting that the claimant objected to the scheme being approved by the Local Government Board, with a view to the removal of those objections it was agreed that the Council would not for a period of twelve years from August 1, 1914, exercise their powers under clause 36 (*b*) of the scheme except under the terms

and conditions contained in clause 2 of the agreement. And by clause 2 of the agreement it was provided that in the event of the Council desiring to exercise their powers under clause 36 (*b*) of the scheme before the expiration of the period of twelve years from August 1, 1914, the Council would pay to the owner the cost of the structural alterations caused by removing, pulling down, and alteration of the shops and buildings and that the Council would also pay to the owner compensation for any loss of rent which might be sustained by him in consequence of the pulling down, removal, and alteration of the shops or buildings from the date of such pulling down, removal, and alteration until the expiration of the said period of twelve years from August 1, 1914. It was also provided by the said agreement that in case any dispute or difference should arise between the parties as to the cost of the said structural alterations or the amount of compensation to be paid by the Council the same should be referred to arbitration pursuant to the Arbitration Act, 1889, or any statutory modification thereof for the time being in force. It was thereby also provided that the claimant should within two months from August 1, 1914, remove all posts erected on the lands of the claimant or in front thereof and also all the brick piers erected on the said lands.

55. The evidence of the claimant's witnesses as to compensation under heads C, D and E was based on the assumption that the powers conferred on the Council by clause 36 (*b*) of the scheme were certain to be exercised at the expiration of the twelve years mentioned in the agreement of September 21, 1914. In the arbitrator's opinion there was no certainty that those powers would be then exercised, but their existence tended to depreciate the market value of the claimant's property, and, if it was his duty to estimate the depreciation, he awarded 500*l.* as compensation under heads C, D and E, assuming the claims under those heads were maintainable in point of law.

56. The following is a summary of the contentions raised on behalf of the Council :—

A. That the whole of the claim was barred by s. 59, sub-s. 2, of the Act and the order of the Local Government Board made thereunder.

B. That the claims under heads A and B were barred by s. 59, sub-s. 1, of the Act.

C. That the claims under heads A and B were also barred by the conviction of Walter Hollidge referred to in para. 31.

D. That the claims under heads A and B were not sustainable because the building line in relation to the claimant's land was, in fact, the same under the Public Health (Buildings in Streets) Act, 1888, as the building line prescribed in the scheme (see para. 37).

E. That the claim under head B was not maintainable in point of law on the grounds stated in para. 48.

F. That the claims under heads C, D and E were barred by s. 58, sub-s. 2, of the Act.

G. That the claims under C, D and E were not maintainable on the ground that the four shops had been erected in contravention of the Public Health (Buildings in Streets) Act, 1888, and must therefore be regarded as unlawful.

H. That the claims under the heads C, D and E were barred by the agreement of September 21, 1914.

57. The arbitrator held that contentions A, B, F and G were well founded in point of law. As to contention C he was of the opinion expressed in para. 36, that the conviction barred the claims under heads A and B as presented by the claimant and that he could not on the evidence award any sum to the claimant under those heads.

As to contention D he was of the opinion expressed in para. 38. He also held that in view of the facts set out in para. 46 he was not entitled to award any sum to the claimant under heads A and B of his claim.

As to contention E he held that this contention was not well founded, but that, assuming that the claimant was entitled in point of law to any compensation in respect of the restrictions imposed by clause 36 (*a*), he was entitled to include in the amount awarded by way of compensation a sum in respect of loss of income between the dates of the making of the scheme and the making of the award.

As to contention H he held that this contention was not well founded.

58. The questions for the opinion of the Court were :—

(*a*) Whether the whole claim was barred by s. 59, sub-s. 2, of the Act and the order of the Local Government Board made thereunder.

(*b*) Whether the claims under heads A and B were barred by s. 59, sub-s. 1, of the Act.

(*c*) Whether the arbitrator was entitled in point of law to hold that, in view of all the circumstances and of the facts stated in para. 46, the conviction referred to in para. 31 debarred him from awarding any sum to the claimant under heads A and B.

(*d*) Whether he was entitled in point of law to hold that, having regard to all the circumstances and to the provisions of the Public Health (Buildings in Streets) Act, 1888, he ought not, in view of the facts stated in para. 46, to award any sum to the claimant under heads A and B.

(*e*) Whether, in the event of it being held that the claimant was entitled to compensation for the injurious affecting of his land by clause 36 (*a*) of the scheme, he was entitled to include in the amount awarded a sum in respect of loss of income between the date of the making of the scheme and the date of the award.

(*f*) Whether the claims under heads C, D and E were barred by s. 58, sub-s. 2, of the Act.

(*g*) Whether he was right in holding that the claims under heads C, D and E were not maintainable on the ground that the four shops had been erected in contravention of the Public Health (Buildings in Streets) Act, 1888, and must therefore be regarded as unlawful.

(*h*) Whether he was right in holding that the agreement of September 21, 1914, did not by itself bar the claim under heads C, D and E.

(*k*) Whether, assuming that the claim under heads C, D

> and E were maintainable he was entitled on the evidence (having regard to the considerations set out in para. 55) to assess a sum as the compensation payable to the claimant under those heads.

The *Appellant* in person. Sect. 59, sub-s. 2, of the Housing, Town Planning, &c., Act, 1909, does not enable the respondents to make a building line, and for that purpose to take land compulsorily without compensation. The learned judge felt himself constrained to give a forced construction to this enactment because of a practice which is said to have grown up under the Public Health Act, 1875. He conceded that if s. 59, sub-s. 2, of the later Act had been the first enactment relating to the space about buildings, he would not have construed it as authorizing the respondents to draw a line beyond which no building can be erected. But the fact that many local authorities have exceeded their powers under s. 157 of the Public Health Act, 1875, is no reason for adding to their number, or for allowing others to exceed their powers under s. 59 of the Act of 1909. That enactment depriving the subject of his property without compensation should be construed strictly. Only by a very liberal construction can an Act enabling a local authority to "prescribe the space about buildings or limit the number of buildings" be taken as authorizing the making of a building line.

Neither can the respondents rely on sub-s. 1 of s. 59 as enabling them to make this building line. They contend that a by-law prescribing a space of 31 feet in front of any new building would have the same effect as their building line, and that such a by-law would be valid. They have an existing by-law—No. 56—referred to in para. 17 of the case, which prescribes a space of 24 feet in front of any new domestic building. A by-law prescribing a space of more than 30 feet throughout the whole of the Council's district might have been successfully objected to as unreasonable. The learned judge did not hold affirmatively that such a by-law would be reasonable. The respondents must establish that it would before they can justify taking land compulsorily. A by-law dealing specially with one portion of the district would be invalid. If neither sub-s. 1 nor sub-s. 2 of s. 59 enables the respondents to lay down a building line they can only do that on the terms of paying compensation to owners of land injuriously affected.

Macmorran K.C. and *Scholefield* for the respondents. The learned judge rightly held that the appellant was debarred from claiming compensation by s. 59 of the Act. First, by sub-s. 2, because clause 36 of the scheme prescribing the building line is a provision which, with a view to securing the amenity of the area included in the scheme, prescribes the space about buildings. By s. 157 of the Public Health Act, 1875, urban authorities are empowered to " make by-laws . . . . with respect to the sufficiency of the space about buildings to secure a free circulation of air, and with respect to the ventilation of buildings." In pursuance of that section innumerable by-laws have been made throughout the country forbidding the erection of houses within a prescribed distance from the centre of the street. There is no material difference between " make by-laws with respect to the sufficiency of the space about buildings " in s. 157 of the earlier Act and " prescribe the space about buildings " in the later Act. If the one enactment justifies a building line, so does the other.

Secondly, the appellant is also precluded from claiming compensation by sub-s. 1 of s. 59 because clause 36 of the scheme is a provision such as would have been enforceable if it had been contained in a by-law. The question is not whether an existing by-law warrants this building line but whether a by-law having that effect would be reasonable. The arbitrator in para. 57 of the case in his answer to contention B must have found that it would be. It was for the appellant to get rid of that finding and he failed to do this. There is nothing unreasonable in prescribing a space of 31 feet in front of new buildings.

Thirdly, even if the above arguments fail, the appellant is not entitled to compensation on the basis on which he claims it. By s. 3 of the Public Health (Buildings in Streets) Act, 1888, and by the findings in paras. 9, 36 and 38 of the case, the appellant cannot, without the written consent of the respondents, use any of his land in front of the main wall of the Southern Shop for the purpose of building a continuous block of houses extending to the road leading to the cemetery. The award does not assess the amount of compensation to which the appellant might be entitled if he elected to renounce his present intention of building such a block. If he is entitled to any compensation the amount must be assessed in view of s. 3 of the Act of 1888.

The *Appellant* replied.

Cur. adv. vult.

July 11. The following written judgments were delivered.

BANKES L.J. This is an appeal from a decision of Bailhache J. upon a special case stated by an arbitrator appointed by the Local Government Board, under s. 58, sub-s. 4, of the Housing, Town Planning, &c., Act, 1909, to deal with a claim made by the appellant, for compensation for the alleged injurious affecting of his land by the making of the Ruislip-Northwood town planning scheme. The Urban District Council of Ruislip-Northwood passed a resolution on January 16, 1911, that application should be made to the Local Government Board for authority to prepare a town planning scheme. The necessary authority was given, and the scheme was finally approved on September 7, 1914. The appellant's claim to compensation was based upon the fact that he was the owner in fee simple in possession free from incumbrances of a strip of land abutting on the High Street, Ruislip, of a total length of about 400 feet, and of a width varying from 50 feet at its widest to 28 feet or thereabouts at its narrowest part. The map which formed part of the town planning scheme indicated that the appellant's land might be utilized for building either shops or dwelling houses, and a building line was shown along the whole length of the land 7 feet back from the edge of the roadway. Clause 36 (*a*) of the scheme provided that where a building line was shown upon the map in respect of any existing street, no building or erection other than boundary walls and fences should be erected and set up

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nearer to the street than the building line. The appellant's case before the arbitrator was that the effect of the scheme was to depreciate the value of his land as building land; and he claimed compensation on the footing that the value of the land unbuilt upon was depreciated by at least one-half; and that in regard to four shops which the appellant had caused to be built upon the land after application had been made for the scheme, he would be put to considerable loss and expense in making them conform to the building line upon the expiration of an agreement in relation to these shops, which he had entered into with the respondent Council. The Council contested the appellant's claim on all points, and submitted that by virtue of the provisions of ss. 58 and 59 of the Housing, Town Planning, &c., Act, 1909, or alternatively by virtue of s. 3 of the Public Health (Buildings in Streets) Act, 1888, the appellant was not entitled to any compensation. The arbitrator decided against the appellant, but stated a special case for the opinion of the Court, in which he set out all the claims and contentions of the parties, and made several alternative awards, intended to cover any possible view which the Court might take in reference to those claims and contentions. The appellant appears to have based his claim before the arbitrator solely upon the ground that the fixing of the building line upon his land deprived him entirely for building purposes of a width of 7 feet of that land along its whole length.

In consequence of the adverse decision of the arbitrator, the appellant launched a motion to set aside the award, on grounds set out in his notice of motion, and referred to in a number of affidavits which were read to this Court. It is sufficient to say that the appellant failed entirely to substantiate any ground for setting aside the award. In so far as his complaint is based upon any action of the Local Government Board, or its then President, in reference to the making, or the approval, of the scheme (even if there was any substance in his complaint, which I do not suggest that there is), it is too late to bring it forward, as s. 54, sub-s. 5, of the Housing, Town Planning, &c., Act, 1909, provides that a town planning scheme, when approved by the Local Government Board, shall have the effect of an Act of Parliament. This appeal is dismissed with costs.

The learned judge took the same view of the appellant's position as the arbitrator had done, and the second appeal is from that decision. The scheme of the Legislature in reference to compensation for injurious affection of property by the making of a town planning scheme is that, while generally speaking a person whose property is injuriously affected by the making of a scheme is to be entitled to compensation, certain exceptions are made by s. 58, sub-s. 2, and s. 59, sub-ss. 1 and 2, to the general rule. The arbitrator has held that the appellant comes within all three exceptions. So far as the appellant's claim is founded upon the loss and expense attendant upon his being compelled at some future time to set back his present shops to conform to the building line, it appears to me quite clear that, as the building of these shops was not commenced until after the application for authority to prepare the scheme was made, the appellant is deprived by the express provisions of s. 58, sub-s. 2, of the Act of any right to compensation under this head.

The question as to whether the appellant's right to compensation is taken away by either sub-s. 1 or sub-s. 2 of s. 59 of the Act is an important one to property owners, and is by no means free from difficulty. It is a well-established rule of construction that a statute is not to be construed so as to deprive a person either of his property or of the beneficial enjoyment of his property without compensation, unless the Legislature has expressed its intention to do so in clear terms. The general intention of the Legislature, as expressed in the Act, is quite clear. It is that a person is not to be deprived either of his property or of any portion of the value of his property without compensation except in certain specified cases which are set out in these sub-sections. The object of sub-s. 1 would appear to be to secure that a man shall not make a profit out of the passing of a town planning scheme, by providing that, if the injury of which he complains might have been brought about by enforcing a by-law under which he could not obtain

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compensation, he shall not be entitled to compensation because the injury is inflicted by the making of a town planning scheme. The justification for sub-s. 2 would appear to be either that the advantages resulting to the property from the provisions of the scheme are considered to equal or outweigh the injury complained of; or possibly that a man ought not to be allowed compensation for doing in reference to his property what, apart from compensation, he ought to do voluntarily. The appellant's position cannot, however, be determined by considerations such as these. The question, and the only question, is whether the Legislature, in enacting sub-ss. 1 and 2 of s. 59, has deprived the appellant of any right of compensation for the injury to his property which he has undoubtedly suffered by the making of the town planning scheme, which sets out the building line along the entire length of his property.

The provisions in the town planning scheme which the appellant says have injuriously affected his property are contained in clauses 36, 40 (*b*), and 63 of the scheme. Sect. 59, sub-s. 1, of the Act provides that no compensation shall be paid in respect of the injury caused to the appellant's property by reason of any of these provisions if and so far as the provisions are such as would have been enforceable if they had been contained in by-laws made by the local authority. So far as the provision as to the building line is concerned, this provision could not have been made by by-law. There is no power in the respondent Council to prescribe a building line by by-law. It is, in my opinion, no answer for the respondent Council to say: True, we could not by by-law have made the provision contained in clause 36, but we could have produced the same result so far as the injurious affection of your land is concerned by a provision of an entirely different character—namely, a provision that you shall provide so much open space in front of any buildings erected on your land. Even assuming the result to be the same, the means of securing the result are not those indicated in the sub-section. The appellant is, I think, justified in claiming that the respondent Council shall be held strictly to the exact wording of the sub-section. Even if this view of the proper construction of the sub-section is not the correct one, I am by no means sure that the contention of the respondent Council that the same result could be effected by prescribing the width of open space in front of any building erected on the appellant's land is well founded. A by-law to be enforceable must be enforceable throughout the whole of the respondent Council's district. They cannot make a by-law the operation of which is confined to the appellant's land. The respondent Council gave no evidence that, having regard to the conditions existing in their district, it would be possible for them to make an enforceable by-law prescribing any greater open space than is in fact prescribed in their existing by-law No. 56. A distance of 24 feet to the opposite side of the street would not prevent the appellant from building up to the boundary of his land abutting on the street. It is not sufficient, in my opinion, for the respondent Council to say the law does not limit the open space that we can prescribe; other Councils prescribe much greater open spaces than 24 feet; we can do the same. The appellant is, I think, entitled to reply: Whether you can do the same depends upon the conditions existing in your district, upon which point you have given no evidence. A further question also arises in connection with this contention of the respondent Council. The providing for the necessity of an open space of a certain width, whether measured from the opposite side of a street or from the centre of a street, would never give a building line in the sense in which that word is used in clause 36 of the scheme unless the street was of uniform width throughout. The street in front of the appellant's land is found by the arbitrator to be of varying width. For these reasons I cannot treat the argument that it is conceivably possible that the respondent Council might, by some by-law having reference to the amount of open space required in front of any new building, prevent the appellant from building in front of the building line laid down in the scheme, as anything more than a mere suggestion and quite insufficient to deprive the appellant of a right to compensation under s. 59, sub-s. 1, even if the construction which I have put upon the language of that sub-section is not the correct one.

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I pass now to consider the language of sub-s. 2 of s. 59. The material question under that sub-section is whether the provision which the appellant says has injuriously affected his property can be said to be a provision which, with a view of securing the amenity of the area included in the scheme or any part thereof, has prescribed the space "about buildings." I am willing to assume that the provision may be said to affect the amenity of the district in which the appellant's property is situate, because "amenity" is a term of such very wide significance. But do the provisions prescribe the "space about buildings" within the meaning of the sub-section? The scheme does, I think, treat a building line as one thing and the space about a building as another and a quite different thing, and the number of buildings which may be erected on a site as a third and also a different thing, in respect of all of which matters separate provisions are made. The groups of clauses which it is material to consider are those from 36 to 55. Clause 49 deals with the limitation of the number of buildings to the acre. In a sense this is a method of prescribing the space about buildings; but this question is dealt with separately, both in the scheme and in the sub-section. In the same way the height and character of buildings are dealt with as separate matters both in the scheme and in the sub-section. The group of clauses in the scheme dealing with space about buildings and building lines is headed "Space about buildings, including building lines." The clauses are Nos. 36 to 48. Nos. 36 to 44 deal with building lines in relation to the line of buildings in a street. Clauses 45 to 48 deal with the space about buildings. It is, I think, material to notice that the draftsman of the scheme has thought it necessary to explain that the group of clauses includes building lines as well as space about buildings. The sub-section, however, contains no reference to building lines; and if there is a real distinction between a provision laying down a building line and a provision providing for the space about a building, I do not think that the sub-section should be construed as including anything except what is definitely mentioned. I have already indicated that I consider that such a real distinction exists; and for the above reasons, I am of opinion that the appellant's claim for compensation is not barred either by sub-s. 1 or sub-s. 2 of s. 59.

There remains the question as to the effect of s. 3 of the Public Health (Buildings in Streets) Act, 1888. It is, I think, clear upon the authorities, that at some point on the appellant's land the shop referred to in para. 10 of the special case would become a house or building on one side of any house or building erected by the appellant on his land so as to bring this section into operation. In so far as the section controls the building line upon the appellant's land, to that extent he cannot claim any compensation, because the building line dictated by the shop above referred to is the same as the one laid down in the scheme. If the building proposed to be erected by the appellant was one continuous building, extending the whole length of his land from north to south, then undoubtedly the building line in reference to any such building would, under the Act of 1888, be the same as that laid down in the scheme. The arbitrator deals with this point in paras. 23 to 27, 36, 37, 38, 41, 43, and 46 and contention D in para. 56 and in para. 57 and in question (*d*) of para. 58. The contentions of the parties as thus stated appear to be that the appellant was contending that he was entitled to be compensated for the injurious affecting of his land for the entire length by reason of the fixing of the building line in clause 36 (*a*) of the scheme. The respondents were contending that the appellant was not entitled to any compensation because of the provisions of s. 59, sub-ss. 1 and 2, of the Housing, Town Planning, &c., Act, 1909; or, alternatively because of the provisions of the Public Health (Buildings in Streets) Act, 1888. The result of my judgment is that the respondents failed entirely in their first and partially in their second contention. Under these circumstances, the arbitrator should, in my opinion, have made an alternative award to meet this state of things. This he has not done, though it seems clear from para. 38 of the case that he had the point in mind.

The appellant's claim (if any) for injurious affection of his land by reason of the provisions of clauses 40 (*b*) and 63 is not mentioned in the special case, and was not, apparently, brought to the notice of the arbitrator. It is, therefore, not before us. The appellant is not entitled in this Court to make a case which was not before the arbitrator, and under these circumstances I express no opinion upon the point.

The net result of my judgment is that the appellant is entitled, by reason of the making of clause 36 (*a*) of the scheme, to compensation for the injurious affection of so much of his land as may be held by an arbitrator not to be affected by a building line drawn from the front of the shop referred to in para. 10 of the special case; but in so far as the claim has reference to the site of the four shops already erected, the compensation must be assessed having regard to the existence of the agreement referred to in para. 52 of the special case, and without reference to the fact that the appellant may, at the expiration of that agreement, be required at his own expense to make the shops comply with the building line laid down in the scheme.

Answering the arbitrator's questions in detail, the answer to (*a*), (*b*), (*c*), (*d*), (*e*), and (*g*) is in the negative, and to (*f*) and (*h*) in the affirmative. The Order of the Court below will be discharged, and the appeal will be allowed with costs.

The case is remitted to the arbitrator, unless the parties agree upon the amount of compensation, with liberty to apply in case the arbitrator is unable to deal with the matter.

Scrutton L.J. Mr. Ellis, the appellant, owned some land at Ruislip, bordering on the main street, and complained that it was injuriously affected by the provisions of a scheme made under the Housing, Town Planning, &c., Act, 1909. His claim went to arbitration, and the legal arbitrator decided that certain provisions of the Act barred Mr. Ellis's right to compensation, but stated a special case for the opinion of the Court. The special case came before Bailhache J., who affirmed the decision of the arbitrator on points which had the effect of depriving Mr. Ellis of any compensation. Mr. Ellis appealed to this Court, and appeared in person.

According to the custom of this Court, he was allowed, as an appellant in person, great latitude in presenting his case, an indulgence which, if not carefully watched, may do injustice to the other side; and it is desirable therefore to make clear, and especially to make clear to Mr. Ellis, that this Court can only deal with the facts found in the special case and the questions on which the opinion of the Court is therein asked, and cannot attend to the many statements which he made to the Court not contained in the special case.

Mr. Ellis also had a motion to set aside the award as invalid on various grounds and appealed against the refusal of Bailhache J. to set the award aside. It is sufficient to say, as the judge below did, that there is no valid ground for this motion, and this appeal must be dismissed with costs.

I now turn to the special case. The Ruislip scheme, dated September 7, 1914, has by s. 54, sub-s. 5, of the Housing, Town Planning, &c., Act, 1909, the force of an Act of Parliament if certain formalities have been complied with, which is found to be the case. Clause 36 (*a*) of the scheme provides that where a building line is shown on the map forming part of the scheme in respect of any existing street, no building or erection other than boundary walls or fences shall be erected nearer to the street than the building line. The scheme by its sixth clause provides that existing streets shall be widened to the extent shown and coloured crimson lake on the map, at the expense of the Council. Mr. Ellis's land abuts on an existing street, and the 7-feet strip affected is not coloured crimson lake. The scheme therefore does not propose to widen the existing street. Mr. Ellis's land is edged purple and cross hatched with purple lines and may therefore under clause 52 of the scheme be used either for shops or private dwelling houses. If used for private dwelling houses, under clause 36 of the scheme, in spite of the prescribed building line, a fence might be erected at the edge of the land, and so the street might not be widened. But if used for shops under clause 40 (*b*) of the scheme nothing should be erected in front of the building line, and under clause 63 goods may only be put on the land for 3 feet in front of the building line. The effect is, I appreciate, that if the land is used for shops, 4 feet is added to the width of the footway, though the land is not coloured lake for widening.

It is clear that a strip of Mr. Ellis's land 7 feet in depth adjoining the street is injuriously affected, and under s. 58, sub-s. 1, of the Housing, Town Planning, &c., Act, 1909, he is, subject to other provisions of the Act, entitled to compensation. But it is said and the arbitrator and judge have found that certain other provisions of the Act deprive him of the compensation he is prima facie entitled to, and while the Courts will be slow to deprive any one of his property without compensation, if Parliament has clearly intended that consequence to follow, the Courts can only give effect to the expressed intention of Parliament, though in case of doubt the presumption would be against taking away private property without compensation. I agree with my brethren on this point; the question is whether this Act of Parliament, and this scheme, which has the force of an Act of Parliament, have this effect.

The first clause said to take away the right to compensation is s. 59, sub-s. 2, of the Housing, Town Planning, &c., Act, 1909, which reads as follows. [The Lord Justice read s. 59, sub-s. 2, of the Act, and proceeded:] This provides that no compensation shall be paid for the operation of any provisions in a town planning scheme which (1.) prescribe the space about buildings; (2.) do so with a view to secure the amenity of the area or any part thereof included in the scheme; (3.) and which the Local Government Board consider reasonable.

The Local Government Board have in the scheme certified that provisions which comply with the first two requirements are reasonable, without stating which those provisions are. Does the provision of a building line by clause 36 (*a*) of the scheme comply with these two requirements? First, does it "prescribe the space about buildings"? Undoubtedly this is an odd phrase to describe a building line, but the phrase has a history. In s. 157 of the Public Health Act, 1875, power is given to local authorities to make by-laws "with respect to the sufficiency of the space about buildings to secure a free circulation of air." Under this provision by-laws have been constantly made that houses shall not be built within so many feet of the centre of the street, or of the opposite house, or the opposite side of the street. The statutory heading of the part of the scheme in which clause 36 prescribing the building line occurs is: "Space about buildings, including building lines." This seems to me to be a statutory declaration that building lines are provisions which prescribe the space about buildings; it is as if Parliament in s. 59, sub-s. 2, of the Act of 1909 had inserted "including building lines" after "prescribe the space about buildings." The words undoubtedly have that effect, and space in front of buildings can be obtained by providing that the building shall not go beyond a particular building line, or that it shall not be built within so many feet of the edge or centre of the street or of the opposite building. Clause 37 of the scheme provides that in streets where there are no building lines no house shall be erected within 30 feet of the middle or 15 feet from the boundary of the street unless in certain streets there is 60 feet in depth in front of the whole house. This section would clearly, in my opinion, be a provision prescribing the space about buildings; and clause 36 appears to me to have the same result, to be another way of securing space about buildings, to be in short a provision which prescribes the space about buildings in the sense in which that term is used in the Act. It ensures that in front of each house there shall be a certain space which gives free ventilation of the air. The first requisite is in my opinion complied with.

Secondly, is clause 36 enacted with a view to secure the amenity of any part of the area in the scheme? The wording here is odd. Sect. 54 of the Act empowers town planning schemes "with the general object of securing proper sanitary conditions, amenity, and convenience in connexion with the laying out and use of the land." Sect. 59, sub-s. 2, uses the language: "Prescribe the space about buildings with a view to securing the amenity of the area." The scheme has clauses 36—48: "Space about buildings, including building lines" ; 49, "Limitation of number of buildings to the acre" ; 57—66, "Sanitary conditions and amenity." The word "amenity" is obviously used very loosely ; it is, I think, novel in an Act of Parliament, and appears to mean "pleasant circumstances or features, advantages." Wide streets and plenty of air and room between houses seem clearly to be amenities, and a provision securing them by setting back houses to a given line seems to me to be a provision with a view to securing amenity. It follows that damage done to Mr. Ellis's land by the operation of clause 36 of the scheme is damage for which, by the operation of s. 59, sub-s. 2, of the Act he is not entitled to compensation. Parliament appears to have sacrificed the individual to the welfare of the area possibly thinking that the increased value of the rest of the land would compensate him for the fetter imposed on part of the land. However, its motives are not for me ; it is only my duty to interpret and apply its enactments. My brothers' view to the contrary would apparently apply to all the provisions for securing abundant air by setting back buildings from the roadway, such as clause 37. It seems to me that Parliament clearly directs these, and considers them as amenities, and refuses compensation for land which cannot be built on because of them.

This conclusion disposes of the case adversely to Mr. Ellis. But a second provision which the arbitrator and judge have also interpreted as depriving Mr. Ellis of compensation is contained in s. 59, sub-s. 1, of the Act. [The Lord Justice read sub-s. 1, and proceeded :] The effect of this is that if the provision complained of would have been enforceable by by-law, no compensation shall be paid in respect thereof. Now a by-law in form enforcing a building line could not be made, but a by-law prohibiting building within so many feet of the edge or middle of the street, or the opposite side of the street, or the opposite house, could be made to secure sufficient air, and, if found reasonable, would have practically the same result as the building line. Seeing that in new streets Parliament has, by clause 37 of the scheme, prevented building within 15 feet of the edge of the street, instead of 7 feet as in this street, and that in some of the existing streets the Parliamentary building line is marked as 25 feet from the edge of the street, I cannot say that such a by-law prescribing that houses should stand 7 feet back in certain streets would be unenforceable as unreasonable, especially as the Local Government Board has certified the provision to be reasonable. The statutory provision also, in my opinion, prevents Mr. Ellis from recovering compensation for the operation of clause 36 of the scheme.

There would be more to be said, as explained above, for a contention that the operation of clauses 40 (*b*) and 63 of the scheme injuriously affected Mr. Ellis's land, but this was not the appellant's case before the arbitrator, and is not raised by the special case or the judgment below.

On these two grounds it appears to me that the decision of the arbitrator and the judge below was right, and the appeal fails. Had Mr. Ellis succeeded, he would have been in great difficulty on two other points.

A considerable portion of his claim—1470*l.* out of 2707*l.*—was in respect of losses in respect of four shops which he erected after the date (January 16, 1911) when the respondents resolved to apply to Government for authority to prepare the scheme. Sect. 58, sub-s. 2, of the Act expressly prohibits him from obtaining any compensation under this head.

Further his length of frontage runs between the Police Station on the north and a shop separated from his land by a lane, but found by the arbitrator to be in the same street with his land. Sect. 3 of the Public Health (Buildings in Streets) Act, 1888, prohibits the erection of any house in any street beyond the front main wall of the house "on either side." Some limitation, a limitation of fact, must be placed on the words "on either side," but it is clear that houses on some undefined length of Mr. Ellis's frontage would have the Southern Shop on one side of them, and would project beyond the main front of the Southern Shop, and therefore be illegal. For some part of the frontage for which Mr. Ellis was claiming compensation he would clearly be in the difficulty that it was illegal to build on it.

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Mr. Ellis addressed to us a very sincere and earnest appeal that the Courts would do him justice which the local authority and Government department denied him. I think the result of the legislation we have been considering is to inflict a hardship on him in depriving him of the use of his property without compensation, but it is the result of the action of Parliament, and the Courts are established to administer the laws, not to strain them in order to redress individual cases which appear to them hard. Hard cases make bad law. In my view the express provisions of the Act of Parliament, when fairly construed, require me to give them a meaning which excludes Mr. Ellis's claim to compensation because he is not allowed to build right up to the edge of his land in a narrow street. I can quite understand that Parliament may have taken a view that a landowner in a community has duties as well as rights, and cannot claim compensation for refraining from using his land where they think that it is his duty so to refrain.

It follows that in my view Mr. Ellis's appeal, which appears to me to raise questions far more important than the individual interests of Mr. Ellis, fails.

EVE J. It is not necessary for me to add anything to what has already been said by the other members of the Court on the second of these two appeals, the appeal by which the appellant seeks to set aside the award. There is no substance in any of the grounds advanced by the appellant in support of that appeal and it must be dismissed with costs.

The first appeal involves questions of general importance arising under an Act which by s. 76 may be cited as "the Housing, Town Planning, &c., Act, 1909," a novelty in Parliamentary nomenclature, the precise meaning or intent of which it is not easy to appreciate, for in plain English the Act becomes "the Housing, Town Planning, and the other things Act, 1909." I shall hereafter refer to it as "the Act."

By the combined effect of s. 54, sub-s. 5, of the Act, the approval of the Local Government Board of September 7, 1914, and clause 36 of the Ruislip-Northwood Town Planning Scheme, 1914 (hereinafter referred to as "the scheme"), a statutory building line has been imposed on a strip of land abutting on the High Street, Ruislip, of about 400 feet in length and of a width varying from 50 feet at its widest to 28 feet 3 inches at its narrowest, of which the appellant is owner in fee simple in possession free from incumbrances. By the imposition of that building line a considerable area of the appellant's land is rendered of insufficient depth for building purposes, and the appellant being therefore a person whose property is injuriously affected by the making of the scheme is prima facie entitled under s. 58 of the Act to obtain compensation in respect thereof from the responsible authority, the respondent Council.

But the statutory right to compensation conferred by s. 58, sub-s. 1, is qualified by the provisions of sub-s. 2 of that same section and by s. 59, sub-ss. 1 and 2, and the respondents contend that the appellant's claim is barred by one or other of these sub-sections. These contentions raise somewhat difficult questions of construction on the Act and scheme, and the learned arbitrator to whom, pursuant to s. 58, sub-s. 4, of the Act, was referred the question whether the appellant's property is injuriously affected and, if so, what is the amount of compensation payable, has made his award in the form of a special case, submitting nine questions for the opinion of the Court.

I proceed at once to deal with these questions. The first is "Whether the whole claim is barred by s. 59, sub-s. 2, of the Act and the Order of the Local Government Board made thereunder?" The sub-section referred to is in these terms. [The learned judge read sub-s. 2, and proceeded:] In the part of the scheme which comprises clauses 36 to 56 inclusive are contained provisions prescribing the several matters enumerated in the sub-section, and by the approval of September 7, 1914, the Local Government Board declared that, having regard to the nature and situation of the land affected by these clauses, they considered these provisions reasonable "so far as they relate to the purpose mentioned in s. 59, sub-s. 2, of the Act." It has not been, and indeed could not be successfully, suggested that the answer to the question we have to determine is concluded by this declaration. It is not a declaration that all the provisions in clauses 36 to 56 are inserted with a view to securing the amenity of the area and are reasonable for that purpose; at most it is a declaration that the provisions prescribing the enumerated matters are reasonable so far as they relate to the securing of the amenity of the area. We have therefore still to consider whether the provision in clause 36 imposing the building line on the appellant's land is a provision prescribing any of the enumerated matters and inserted with a view to securing the amenity of the area. It is admitted that it is not a provision limiting the number of buildings to be erected or prescribing the height or character of buildings, but it is argued that it is a provision "prescribing the space about buildings" and, being inserted to secure the amenity of the area, is a provision which excludes the appellant's right to compensation.

I am quite unable to adopt that view. Although I am not prepared on the present occasion to hazard any opinion as to the proper construction of the word "amenity" in this sub-section, I will assume, without deciding the point, that the provision fixing a uniform building line is one inserted with a view to securing the amenity of the area, and further that the setting back of the frontage increases, and in some degree prescribes, the space about buildings; it also, where the depth of the land available for building is thereby diminished to the extent of rendering part of it unusable for building purposes, limits the number of buildings to be erected, and it may in similar circumstances indirectly prescribe the height and character of the buildings to be erected. But how can any or all of these incidents operate to convert the express provision prescribing a number of building lines throughout the area and prohibiting the erection of any building other than boundary walls or fences nearer to the street than such building line into a provision prescribing the space about buildings? In my opinion it might just as plausibly be argued that, in the circumstances of this case, it is a provision prescribing the number of buildings to be erected.

It has been urged that local authorities have made a practice of utilizing the provisions of s. 157 of the Public Health Act, 1875, relating to space about buildings for the purpose of prescribing building lines, and that this practice—upon which I express no opinion as our attention was not called to any authority binding on this Court in support of it—warrants us in construing the expression in this Act "provisions inserted prescribing the space about buildings" as equivalent to "provisions inserted prescribing building lines." I am not prepared so to do, nor, in the absence of any evidence to establish the fact that any provisions could have been framed prescribing the space about buildings which would have fixed the uniform building line imposed on the appellant's land, am I prepared to adopt the view that the same result might have been brought about by framing the provision as one prescribing the space about buildings instead of as one prescribing a building line. It is perhaps sufficient answer to this argument to point out that the provision has not been so framed and that as it stands it is a provision prescribing a building line and not one prescribing the space about buildings. It follows that in my opinion it is not a provision to which s. 59, sub-s. 2, has any application, and I think the first question in the special case ought therefore to be answered in the negative. In connection with this and the next question it must be borne in mind that we are here considering an Act which expressly and in terms recognizes the right to compensation in respect of property injuriously affected by the scheme and that, in examining these parts of the Act which create exceptions, the canon of construction applicable is that they must not be deemed to take away or extinguish the right unless it appear by express words or by plain implication that it was the intention of the Legislature so to do: *Western Counties Ry. Co.* v. *Windsor and Annapolis Ry. Co.* (1) Brett M.R. in *Attorney-General* v. *Horner* (2) states the rule in these terms: "It is a proper rule of construction not to construe an Act of Parliament as interfering with or injuring persons' rights without compensation, unless one is obliged to so construe it. If it is clear and obvious that Parliament

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(1) (1882) 7 App. Cas. 178, 188.

(2) (1884) 14 Q. B. D. 245, 257.

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has so ordered, and there is no other way of construing the words of the Act, then one is bound to so construe them, but if one can give a reasonable construction to the words without producing such an effect, to my mind one ought to do so." Lord Davey in *Commissioner of Public Works* (*Cape Colony*) v. *Logan* (1) says: "Such an intention"—i.e., an intention to take away property without any compensation—"should not be imputed to the Legislature unless it be expressed in unequivocal terms. This principle has frequently been recognised by the Courts of this country as a canon of construction." And finally Bowen L.J. in *London and North Western Ry. Co.* v. *Evans* (2) sums up the matter thus: "The Legislature cannot fairly be supposed to intend, in the absence of clear words showing such intention, that one man's property shall be confiscated for the benefit of others, or of the public, without any compensation being provided for him in respect of what is taken compulsorily from him"; and a little further on he adds that this maxim and another are "doctrines of sound sense and obvious justice, to be borne in mind in dealing with legislation, which cannot be supposed, unless it so explicitly states, to neglect what is. . . . natural justice."

I pass to the second question submitted to the Court which is in substance whether the claims of the appellant for compensation for injury arising from the imposition of the building line are barred by s. 59, sub-s. 1, of the Act. [The learned judge read sub-s. 1, and proceeded:] The question we have to decide resolves itself into this: Is the provision in this scheme fixing the building line a provision which could have been contained in an enforceable by-law made by the authority? It is conceded by the respondents that the authority cannot make an enforceable by-law prescribing a building line; but the same argument as was relied on to establish the proposition that a provision prescribing the space about buildings is identical with a provision prescribing a building line, because it may bring about the same result, is again advanced to prove that by means of an enforceable by-law prescribing the space about buildings the authority could have made an enforceable provision fixing the building line. I cannot accept that proposition as sound. Apart from the question of fact, a very serious one, whether any enforceable by-law relating to the space about buildings could have been so framed as to bring about, in the circumstances here existing, of a long stretch of land abutting on a highway of varying width, a continuous building line as prescribed by the scheme, I think the short answer to the Council's case on this sub-section is this—that according to its true construction it only comes into operation in those cases in which the provision contained in the scheme is capable of being translated into an enforceable by-law, and that it would be doing violence to the words of the sub-section to extend its operation to cases where the actual provision is admittedly incapable of being translated into a valid by-law, but where the result brought about by the provision might possibly also have been brought about by a by-law framed to prescribe something quite different. Accordingly I think the second question submitted by the arbitrator ought also to be answered in the negative, and it results from the conclusions I have so far arrived at that the order made by Bailhache J. ought to be discharged. It further results in this, that we must deal with the seven other questions submitted but fortunately not at any great length.

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(1) [1903] A. C. 355, 363, 364.

(2) [1893] 1 Ch. 16, 28.

To question No. 3, marked (*c*) in the case, the respondents concede, as they are obviously bound to do, that our answer must be in the negative. I omit for the moment questions 4 and 5, marked (*d*) and (*e*), and pass to question No. 6. This and the three questions that follow it relate to the appellant's claim under various heads for compensation for the anticipated losses he will incur when the time comes for him to set back to the building line prescribed by the scheme the frontages of four shops already erected by him on the land. These shops were wholly erected after the date on which application for authority to prepare the scheme was made by the Council, and the appellant's right to obtain compensation for these anticipated losses is, in my opinion, barred by s. 58, sub-s. 2, of the Act, whereby it is provided that " a person shall not be

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entitled to obtain compensation on account of any building erected on . . . . land included in a scheme after the time at which the application for authority to prepare the scheme was made." Our answer therefore to question No. 6 (marked (*f*) in the case) is in the affirmative, and this answer dispenses with any necessity to consider further the three concluding questions submitted.

Reverting to question No. 4 I think it ought to be answered in the negative. I can see nothing in the facts found by the arbitrator to preclude the appellant from bringing in fresh plans and substituting separate buildings and even dwelling houses for the single block for which he has hitherto lodged plans and which he has hitherto been persistently asserting a right to build. An owner of land does not lose his right to use it for legitimate purposes by asserting even up to the highest tribunal a right to use it for purposes which he may there for the first time find out to be illegitimate. The appellant's attitude has been one of challenge throughout, and in my opinion it would be a grave injustice to him when that attitude is shown not to be maintainable to hold that by adopting it he has definitely and finally elected to abandon all opportunity of so modifying his plans as to establish his right to compensation. The land, although I can quite understand the appellant entertaining some doubt as to the truth of the statement, is still his, and if and so far as its value has been depreciated in his hands by the provisions of this scheme he is in my opinion entitled to be compensated, and not the less so because he has wrongly asserted a right to utilize the land in a manner which might have resulted in his being unable to substantiate any grounds for recovering compensation. I desire as far as possible to confine myself to answering the questions as put to us by the arbitrator and, while I do not at all dissent from what has been said by the President of the Court as to the duty of the arbitrator in awarding compensation to pay regard to the building line fixed by what has been referred to as the Southern Shop and to the agreement with the Council in respect of the four shops, I do not wish to commit myself to any expression of opinion on these heads which will preclude me from considering them at large should the matter ever again come up for review in this Court.

To the last remaining question, No. 5, I think a negative answer should be returned. It is contrary to the practice to add interest from an antecedent date to an amount awarded as compensation, and this claim for loss of income is in substance a claim for interest. As I have already intimated the measure of compensation is the decrease in value of the appellant's land brought about by the provision in the scheme prescribing the building line. Decrease in value due to other contributory factors is not an element to be regarded in fixing the compensation.

The net result is that, in my opinion, we ought to discharge the order of the Court below and, answering the questions as follows, that is to say, questions (*a*), (*b*), (*c*), (*d*), (*e*), and (*g*) in the negative and questions (*f*) and (*h*) in the affirmative, we ought to order the respondents to pay the costs of the hearing in the Court below and of this appeal and remit the case as so answered to the arbitrator with liberty to apply to this Court in the event of the arbitrator for any reason being unable or unwilling to deal with it.

Appeal allowed.

Case remitted to arbitrator.

Solicitor for appellant: *Herbert A. Phillips.*

Solicitors for respondents: *Charles Rogers, Sons & Abbott.*

W. H. G.

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Oct. 21.

BLACKPOOL AND FLEETWOOD TRAMROAD COMPANY, APPELLANTS v. BAILEY, RESPONDENT.

Local Government—Private Act—Incorporation of Public Act—Inconsistency—Tramcar—Hackney Carriage—Control of Board of Trade over Tramway—Licence of Local Authority—Penalty for using Tramcar as Hackney Carriage without Licence—Town Police Clauses Act, 1847 (10 *&* 11 *Vict. c.* 89), *ss.* 38, 45—*Tramways Act,* 1870 (33 *&* 34 *Vict. c.* 78), *s.* 48—*Town Police Clauses Act,* 1889 (52 *&* 53 *Vict. c.* 14), *s.* 3—*Blackpool and Fleetwood Tramroad Act,* 1896 (59 *&* 60 *Vict. c. cxlvii.*).

By the Blackpool and Fleetwood Tramroad Act, 1896, the appellants, a tramroad company, are empowered subject to the provisions of the Act to use animal, electric or mechanical power, but, with respect to electric or mechanical power, subject to the regulations set forth in the First Schedule thereof and to any further regulations made by the Board of Trade for protecting the public against danger. By the First Schedule to the Act every carriage used on the tramway is to be so constructed as to provide for the safety of passengers and for "their safe entrance to exit from and accommodation in" the carriage, and by regulations made by the Board of Trade it is provided (inter alia) that the Board shall on the application of the local authority inspect the carriages used on the tramways and the working arrangements generally, and may whenever they think fit prohibit the use on the tramways of any of them which in their opinion are not safe for use. By the Act of 1896, Parts II. and III. of the Tramways Act, 1870, are incorporated so far as (inter alia) they are not inconsistent with the provisions of the Act of 1896. By Part III., s. 48, of the Tramways Act, 1870, the like power is given to the local authority of granting licences with regard to carriages using the tramways, and to drivers and conductors as they are entitled to grant with respect to hackney carriages. By s. 38 of the Town Police Clauses Act, 1847, every wheeled carriage used in plying for hire in any street within the prescribed distance is to be deemed to be a hackney carriage within the meaning of the Act, and by s. 45, if the proprietor of any carriage permits it to be used as a hackney carriage plying for hire without a licence he is to be subject to a penalty. By s. 4, sub-s. 1, of the Town Police Clauses Act, 1889 (which is to be construed as one with the Town Police Clauses Act, 1847), the term "Hackney carriages" in s. 45 of the Town Police Clauses Act, 1847, is, notwithstanding anything in s. 38 of that Act, to be deemed to include every omnibus, and by s. 3 of the Act of 1889 the term "omnibus" is not to include any tramcar.

The appellants, the Blackpool and Fleetwood Co., were convicted before justices of having used a tramcar as a hackney carriage without having obtained from the local authority a licence for the carriage to ply for hire, contrary to the Act of 1896:—

Held, that the powers granted to the Board of Trade by virtue of the

Act of 1896 were not inconsistent with those granted to the local authority by virtue of s. 48 of the Tramways Act, 1870, and that Parts II. and III. of that Act were incorporated with the Act of 1896.

Held, further, that the tramcar was a hackney carriage within the meaning of s. 38 of the Town Police Clauses Act, 1847, and as there was nothing in s. 3 of the Town Police Clauses Act, 1889, which prevented the operation of s. 48 of the Tramways Act, 1870, upon the tramcar as a hackney carriage, the penalty provided by s. 45 of the Town Police Clauses Act, 1847, for plying for hire without a licence was rightly inflicted upon the appellants by the justices.

CASE stated by justices for the county of Lancaster.

An information was preferred on May 30, 1919, by the respondent, Bailey, hackney carriage inspector to the Fleetwood Urban District Council, against the appellants, the Blackpool and Fleetwood Tramroad Co., for that they the appellants on May 21, 1919, in the township of Fleetwood in the county of Lancaster being the proprietors of a certain carriage to wit a tramcar (No. 20) unlawfully did permit the same to be used as a hackney carriage within the Urban District of Fleetwood without having obtained from the Fleetwood Urban District Council a licence for the carriage to ply for hire, contrary to the Blackpool and Fleetwood Tramroad Act, 1896.

Upon the hearing of the information the following facts were admitted or proved :—

(*a*) On May 21, 1919, the respondent boarded the tramcar No. 20 belonging to appellants at "The Terminus," North Albert Street, Fleetwood, at 2.45 P.M. There were fourteen or fifteen passengers in the car. The respondent paid his fare, other persons also paid. The car stopped at Victoria Street, Lord Street, Church Street, Poulton Street and Ash Street. Persons got on and off the car at each of those streets. North Street and Lord Street are public highways. Lord Street is what was formerly known as West Street and East Street. This is the tramway referred to in s. 6 of the Blackpool and Fleetwood Tramroad Act, 1896.

(*b*) The carriage was a tramcar worked by electrical energy and was constructed for and used by the appellants to run over their tramroad and tramway by virtue of the Blackpool and Fleetwood Tramroad Act, 1896, and regulations dated March 13, 1899, made by the Board of Trade as regards electrical power (overhead trolley system) on the Blackpool and Fleetwood tramways, and formed a part of the rolling stock for the tramroad and tramway authorized to be provided therefor by the said Act and Order.

The respondent contended :—

(*a*) That the tramway portion of the appellants' undertaking is by virtue of ss. 2 and 3 of the Blackpool and Fleetwood Tramroad Act, 1896, subject to the provisions of Parts II. and III. of the Tramways Act, 1870, and by s. 48 of the latter Act the Fleetwood Urban District Council have the like power of making and enforcing rules and regulations and of granting licences with respect to all carriages using the tramways and to all drivers conductors and other persons having charge of or using the same, and to the standings for the same as they are for the time being entitled to make enforce and grant with respect to hackney carriages and the drivers and other persons having the charge thereof and to the standings for the same in the streets and district of or under their control.

(*b*) That by the Town Police Clauses Act, 1847 (incorporated with the Public Health Act, 1875), the Fleetwood Urban District Council are empowered to license hackney coaches or carriages of any kind or description adapted to the carrying of persons as they think fit, and that as the appellants have permitted a tramcar belonging to them to be used within the district of the Fleetwood Urban District Council without a licence from the Council the appellants are liable for the offence to the penalty prescribed by s. 45 of the Town Police Clauses Act, 1847.

The appellants contended :—

(*a*) That the tramcar No. 20 is in any event not a hackney carriage within the meaning of the Blackpool and Fleetwood Tramroad Act, 1896, or any Act incorporated therewith.

(*b*) That by reason of the Blackpool and Fleetwood Tramroad Act, 1896, and the Acts incorporated therewith, and the Board of Trade Regulations dated March 13, 1899, the provisions of the Town Police Clauses Act, 1847 and 1889, did not apply to the carriage, and in any case no such licence as referred to in the information is required therefor.

(*c*) That the appellants are by virtue of s. 10, sub-s. 5, of the Blackpool and Fleetwood Tramroad Act, 1896, compelled to run four times daily through cars between Blackpool and Fleetwood.

(*d*) That the carriage did not ply for hire within the meaning of the Blackpool and Fleetwood Tramroad Act, 1896, or any Act incorporated therewith.

The justices were of opinion that the car was a hackney carriage within the meaning of the Town Police Clauses Act, 1847; that the provisions of the Act applied to the carriage and were not overridden by the Blackpool and Fleetwood Tramroad Act, 1896, and the Board of Trade Regulations of March 13, 1899, and that the appellants had been guilty of an offence under s. 45 of the Town Police Clauses Act, 1847, in permitting the car to be used as a hackney carriage plying for hire within the Urban District of Fleetwood without having obtained a licence for the same. They accordingly convicted the appellants. The question for the opinion of the Court was whether the justices came to a correct determination in point of law.

E. G. Palmer for the appellants. The Tramways Act, 1870, is not incorporated with the Blackpool and Fleetwood Tramroad Act, 1896, because the provisions of the Act of 1870 are inconsistent with those of the Act of 1896. Sect. 6 of the Act of 1896 gives power to the company to "work use and maintain" the tramway. The tramway was constructed and is worked and maintained not under the Act of 1870 but under the Act of 1896. Therefore s. 48 of the Tramways Act, 1870, which gives the local authority power to grant licences in respect of carriages using the tramways cannot operate on the tramcars used by the appellants. By s. 7, sub-ss. 8 and 9, of the Act of 1896, the company are bound to run tramcars at certain intervals and times, and the undertaking is to be run as a continuous line, and by s. 10, sub-s. 5, the company is bound to run through cars at least four times every day in both directions. Therefore the local authority cannot choose as to what tramcars they will license, because they would be interfering with the statutory duty of the appellants under the Act of 1896. By s. 38 of the Act of 1896 power is given to the Board of Trade to order the company to carry out improvements for the greater security of the public. Therefore the corresponding provisions of the Town Police Clauses Act, 1847, with regard to hackney carriages have no application. A series of provisions in the Act of 1896 supersede any corresponding provisions in the Act of 1847. For example s. 46 of the Act of 1896, which relates to agreements between the company and the local authority with regard to the working of the tramway. As the appellants are under a statutory obligation cast upon them by the Act of 1896 to run the tramcars over a continuous line a specified number of times every day it follows that the Act of 1896 must confer upon them a licence to run the tramcars. Under the Act of 1896 the appellants are under the control of the Board of Trade and are not subject to the control of the local authority. By s. 48 of the Act of 1896 power is given to the Board of Trade to make rules and regulations as to the mode of working level crossings, and by s. 57 the use of carriages moved by electric or mechanical power is to be subject to the regulations set forth in the First Schedule to the Act and to regulations made by the Board of Trade for securing to the public reasonable protection against danger. Under the regulations in the First Schedule carriages must be constructed so as to provide accommodation for passengers, and power is given to the local authority to apply to the Board of Trade, who may upon the application prohibit the use of any carriage which in their opinion may not be safe for use on the tramway. That regulation shows that the local authority has the right of complaint solely and not the power to grant licences. The code in that regulation is exhaustive. The introductory clause to the regulations made by the Board of Trade on March 13, 1899, and contained in the Statutory Rules and Orders, No. 169, is very sweeping. So also are regulation I., clauses (*d*) and (*h*) and regulations II., IV. and V. of that Order. The appellants cannot be subject to the control of the local authority and also of the Board of Trade. The effect of the statute of 1896 and the order is that the appellants have Parliamentary authority to work the tramway subject to the control of the Board of Trade, and the local authority has power to complain to the Board of Trade. The power given to the Board of Trade by s. 60 of the Act of 1896 to direct the company, if it uses mechanical power on the tramway contrary to the Act or regulations, to cease to exercise the powers conferred upon them by the Act, is most drastic. Power is given to the Board of Trade by s. 61 to make by-laws for the purpose of (inter alia) regulating the accommodation in carriages on that part of the tramway upon which mechanical power is used. If the powers given to the Board of Trade are exercised there is nothing which a local authority can usefully do. The Act of 1896 is a different kind of statute from that contemplated by s. 22 of the Tramways Act, 1870, by which Parts II. and III. of the Act of 1870 are incorporated with Provisional Orders and Special Acts except so far as they shall be expressly varied or excepted by the Provisional Orders or Special Acts.

If however Parts II. and III. of the Tramways Act, 1870, are incorporated by the Act of 1896 the tramcar is not a hackney carriage within the meaning of the Act of 1896 or any other material statute, and therefore the local authority has no power to license it under s. 48 of the Tramways Act, 1870. The definition of hackney carriage contained in s. 38 of the Town Police Clauses Act, 1847, is undoubtedly wide, for it includes every wheeled carriage plying for hire in the street; but that definition is cut down by s. 3 of the Town Police Clauses Act, 1889, for although by s. 4 of that Act a "Hackney carriage" in s. 38 of the Act of 1847 is to include an omnibus, by s. 3 of the Act of 1889 (which by s. 2, sub-s. 1, is to be construed as one with the Act of 1847) the term "omnibus" is not to include a tramcar. The result is that a tramcar is not a hackney carriage within the meaning of the Act of 1847, and therefore the justices had no power to inflict the penalty imposed by s. 45 of that Act for plying for hire without a licence.

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[Sect. 37 of the Town Police Clauses Act, 1847, ss. 69, 70, 71, 72, 74, 75 and 76, of the Blackpool and Fleetwood Tramroad Act, 1896; *Thornton Urban Council* v. *Blackpool and Fleetwood Tramroad Co.* (1); and *Yorkshire (Woollen District) Electric Tramways* v. *Ellis* (2) were also referred to.]

H. H. Joy for the respondent. There is nothing in the various sections of the Blackpool and Fleetwood Tramroad Act, 1896, which have been referred to on behalf of the appellants inconsistent with Parts II. and III. of the Tramways Act, 1870. Sect. 48 of the Act of 1870 entitles the local authority to license tramcars, drivers, and conductors in the same way as if the tramcars were hackney carriages. The regulations in the First Schedule to the Act of 1896 have no application except where electrical or mechanical power is used. The Act of 1896 gives no power of supervision to the Board of Trade where animal power is used. The word "accommodation" in s. 61 and the First Schedule to the Act of 1896 merely means the seats on which the public are permitted to sit. It does not for instance deal with objectionable advertisements and other matters which are left in the hands of the local authority. There is no inconsistency in the Board of Trade exercising their expert powers over mechanical power and the local authority supervising the comfort of the public. Sect. 10, sub-s. 5, of the Act of 1896 only applies to the tramroad, not to the tramway. The fact that the Board of Trade regulates electrical power does not prevent the local authority making regulations with regard to public comfort.

Sect. 3 of the Town Police Clauses Act, 1889, did not include in the term "omnibus" a tramcar because tramcars were already licensed by the local authority under s. 48 of the Tramways Act, 1870.

Palmer in reply. The scheme of the Blackpool and Fleetwood Tramroad Act, 1896, is to take the control of and power to license tramcars entirely away from the local authority and confer it upon the Board of Trade.

(1) [1909] A. C. 264.

(2) [1905] 1 K. B. 396.

EARL OF READING C.J. The appellants, the Blackpool and Fleetwood Tramroad Co., are incorporated under a private Act of Parliament—the Blackpool and Fleetwood Tramroad Act, 1896. They were summoned for unlawfully permitting a tramcar, of which the company were the proprietors, to be used as a hackney carriage within the urban district of Fleetwood without a licence from the Urban District Council. The justices convicted, and the question is whether they were right in the view they took of the law. It has been contended on behalf of the appellants that the justices were wrong for two reasons; first, that the Act of 1896 was a complete code regulating the working of the tramway undertaking, and that by a special provision of the Act, wherever there was anything inconsistent in certain statutes which were incorporated, they were to be dealt with in pursuance of the Act of 1896. Sect. 3 and Parts II. and III. of the Tramways Act, 1870, are incorporated by s. 2 of the Act of 1896, so far as they are applicable to and are not varied by or inconsistent with the provisions of the latter Act. Part III. of the Tramways Act, 1870, by s. 48 gives the local authority a power to license drivers and conductors of all carriages using the tramways similar to that which they for the time being have with regard to granting licences with respect to hackney carriages. That section means, if it applies, that a carriage used on the tramways must be licensed by the local authority as if it were a hackney carriage. It is contended that the section does not apply inasmuch as it is either expressly varied by or inconsistent with the provisions of the Act of 1896. There is no section in the Act of 1896 which expressly varies s. 48 of the Tramways Act, 1870, nor, having regard to the whole scope of the Act of 1896 and the scheme which it authorizes, is there anything in any section of it which would make the application of Part III. of the Tramways Act, 1870, inconsistent with the provisions of the Act of 1896. Mr. Palmer has, on behalf of the appellants, addressed to us a careful and able argument in support of the proposition that there is inconsistency, but on a close examination of the Act of 1896 I am unable to accede to the view he has supported. First

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Earl of Reading C.J.

he relied upon certain provisions of the Act of 1896 (ss. 6 and 7 amongst others) which relate to the working and maintaining of the lines. I think that the answer is that there is nothing in any section which makes the application of Part III. of the Tramways Act, 1870, inconsistent with the special provisions of those sections. The tramway can be worked, used and maintained notwithstanding that a carriage which is to be used upon the tramway must be licensed by the local authority. I cannot accept the view that working the tramway would cover every possible use that could be made of the undertaking so as to give parliamentary sanction to the use of tramway carriages limited only by the powers given by the Act of 1896 in the express provisions thereof. It seems to me quite consistent with the provisions of the Act of 1896 that there should be a tramway worked, used and maintained, which nevertheless requires for the use of a carriage on the tramway the licence of the local authority.

On behalf of the appellants it was also contended that s. 10, sub-s. 5, of the Act of 1896, taken in conjunction with other sections, shows that it was never intended that there should be any control or supervision of the tramway by the local authority. Sect. 10, sub-s. 5, provides that after the opening of the tramroad through cars shall be run every day except Sunday between certain periods at least four times every day in both directions. It is said that that provision has a limited application only, because the sub-section only applies to a limited portion of the tramway; but to my mind the comprehensive answer is again that there is nothing inconsistent in the provisions of that sub-section with the duty of obtaining a licence from the local authority for a carriage to be run over that part of the line. There is an obligation placed upon the tramway company to run through trams at least four times a day in the manner described in the sub-section; but there is nothing which provides that the carriage may be such a carriage as the tramway company wishes, or as may be prescribed by the Board of Trade, and therefore that contention fails.

We now come to the sections which are, in my opinion, the most material (passing over other sections to which the observations which I have already made apply). Sect. 57 of the Act of 1896 enacts that carriages may be moved by animal, electric, or any mechanical power other than steam, provided that the exercise of these powers, with regard to electric or mechanical power, shall be subject to the regulations set forth in the First Schedule to the Act, and to any regulations which may be made by the Board of Trade; and the Board of Trade are empowered to make regulations from time to time as they may think fit for securing to the public all reasonable protection against danger in the exercise of the powers conferred with respect to the use of electric and mechanical power on the tramway. On behalf of the appellants that section was relied upon in order to persuade us that its provisions are inconsistent with those of the Tramways Act, 1870. It was contended that it is impossible to conceive that Parliament could have intended to place this undertaking under the dual control of the Board of Trade and, within the limitations of certain statutes, of the local authority; that s. 57 of the Act of 1896 shows clearly that the Board of Trade was to control the use of the electrically propelled car, as does Schedule 1 of the Act, and that the provisions are meant to be comprehensive as regards the working of the electrical tramcars. At first sight that argument appeared to me to have great weight, but I have come to the conclusion upon an examination of s. 57 more closely, and particularly in view of ss. 61 and 63 and the First Schedule, that it cannot be upheld. Sect. 57 applies only to electrically propelled cars; it does not apply to cars moved by animal power. If the language of the section compelled us to hold that a distinction was intended to be drawn, and that Parliament thought that the Board of Trade should have control as regards electrically equipped cars, but that cars moved by animal power should remain under the local authority, that would have been a possible view. But I am clear that Parliament meant to give dual control, and did not mean to take away the powers conferred upon the local authority by virtue of the Tramways Act, 1870, but intended to superimpose the control of the

Board of Trade by such regulations as it might make and for that reason had to introduce s. 57 into the Act. It was introduced for the purpose of giving a limited control to the Board of Trade, limited as to the class of vehicle (inasmuch as it does not apply to carriages moved by animal power), and further limited as regards the powers given to the Board of Trade by virtue of the words used in the latter part of the section "for securing to the public all reasonable protection against danger in the exercise of the powers." By s. 61 power is given to the Board of Trade to make by-laws for a number of purposes. There is nothing in the section inconsistent with the retention by the local authority of the power to license hackney carriages or tramcars which are to be in the same position as hackney carriages for that purpose. Sect. 63 in my judgment is conclusive, because it assumes that the provisions of the Tramways Act, 1870, relating to the making of by-laws by the local authority with respect to the rate of speed shall continue. It imposes certain limitations: the local authority may not allow a rate of speed for a travelling car above that sanctioned by the Board of Trade, but may make by-laws for restricting the rate of speed to a lower rate. That shows that dual control was considered and intended by Parliament and, taken in conjunction with other sections to which I have referred, negatives the contention that the powers granted by the Tramways Act, 1870, are inconsistent with those granted by the Act of 1896. In a word, the conclusion at which I have arrived is that the Act of 1896 is not, by itself, in its express terms a complete code; but that it incorporates provisions which bring into operation other statutes which confer powers upon the local authority which are saved by the provisions of the Act of 1896. The first point therefore in my view fails.

It was further contended, on behalf of the appellants, that in any event—even if they were wrong upon this first point—the tramcar was not a hackney carriage within the meaning of the Act of 1896 or any other statute. That contention means that a tramcar cannot be regarded as a hackney carriage within the meaning of the Town Police Clauses Act, 1847, or

1889. Immediately we conclude that Part III. of the Tramways Act, 1870, applies; s. 48 of that Act gives power to the local authority to grant licences with respect to all carriages using the tramways in the same way as they grant them for the use of hackney carriages. Therefore the test to be applied in this particular case is whether or not this tramcar stood in the same position as a hackney carriage with regard to the local authority. We were referred to s. 38 of the Town Police Clauses Act, 1847, which says what vehicles may be deemed hackney carriages. It is very wide in its application, and the language used would be sufficient to include a tramcar. But it is said that the Town Police Clauses Act, 1889, cuts down the operation of the Act of 1847. I am unable to accept that view. By s. 3 of the Act of 1889 there is a definition of the term "omnibus" which is very wide, but it is provided that it shall not include any tramcar or tram carriage duly licensed under the provisions of the Tramways Act, 1870, and the Act of 1889 therefore does not apply to tramcars. But there is a very good reason for that. There was the Tramways Act, 1870, in operation which had already given the power. It is to be observed that the statutory power conferred on a local authority is not limited save in so far as any limitation is to be found in the express language of the Act of 1889, and there is nothing there which would prevent the operation of the Tramways Act, 1870, upon a tramcar as a hackney carriage. By s. 45 of the Town Police Clauses Act, 1847, a penalty is imposed upon the proprietor of any carriage who permits the same to be used as a hackney carriage plying for hire within certain distances, and it was alleged that the proprietors of the tramway had incurred a penalty by permitting a carriage —that is a tramway carriage—to be used as a hackney carriage plying for hire. The justices came to the conclusion that an offence had been committed. I have come to the conclusion that the justices were right, that the offence had been committed, and that consequently they were entitled to convict and impose the penalty.

I see no difficulty in working out the arrangements which the tramway company have to make; it is no part of the case before us, and no part of the reasoning by which I arrived at the conclusion I have expressed, but it is some satisfaction to know that for a number of years licences have been applied for in accordance with the view which I have expressed, and the tramways undertaking has, notwithstanding, been carried on up to the present time. In my opinion the appeal must be dismissed.

AVORY J. I am of the same opinion. Mr. Palmer's contention on behalf of the appellants may be succinctly stated thus: The provisions of the Blackpool and Fleetwood Tramroad Act, 1896, and the regulations in the First Schedule to that Act and the regulations made by the Board of Trade under that Act are inconsistent with the general power to license tramcars conferred upon the local authority by the Tramways Act, 1870, and if it had been shown that the powers conferred by the Act of 1896 and exercised by the Board of Trade were inconsistent with the exercise by the local authority of their power under the Tramways Act, 1870, the argument would succeed. If, however, the powers which are exercised under the Act by the Board of Trade may be exercised for a purpose different from that for which the local authority exercise their powers—in other words, if they may co-exist without any conflict—there is no inconsistency. In my view the whole of the powers conferred upon the tramway company and the Board of Trade by the statute are conferred for the purpose only of protecting the public and preserving their safety in consequence of the use of electrical or mechanical power on the tramway. Each section dealing with the subject, notably s. 57, is directed to that purpose and that purpose only. Sect. 57 concludes with the words: "provided always that the exercise of the powers hereby conferred with respect to the use of electric or mechanical power on the tramway shall be subject to the regulations set forth in the First Schedule to this Act and to any regulations which may be added thereto or substituted therefor respectively by any order which the Board of Trade may and which they are hereby empowered to make from time to time as and when they may think fit for securing to the public all reasonable protection against danger in the exercise of the powers by this Act conferred with respect to the use of electric or mechanical power on the tramway." Turning to the regulations in the First Schedule the same idea is obviously running through them. The regulation chiefly relied upon on behalf of the appellants is headed "As to Carriages." "Every carriage used on the tramway shall be so constructed as to provide for the safety of passengers and for their safe entrance to exit from and accommodation in such carriage and their protection from the machinery of any engine used for drawing or propelling such carriage." At first I thought that the word "accommodation" in that regulation was wide enough to support the contention that it gave the Board of Trade power to look after and provide for any matter which affected the accommodation of passengers on the tramway, but I am satisfied after consideration that the word "accommodation" is governed by the word "safe." The word "safe" governs the words "entrance to exit from and accommodation." Therefore the whole of the regulation is intended to provide for the safety of passengers who are being carried in an electrically or mechanically propelled tramcar. Turning to the further regulations which have been made by the Board of Trade in the Statutory Rules and Orders, 1899, No. 169, dated March 13, 1899, the same view, I think, is apparent all through. The preamble is: "The Board of Trade, under and by virtue of the power conferred upon them in this behalf, do hereby order that the following regulations for securing to the public reasonable protection against danger in the exercise of the powers conferred by Parliament with respect to the use of electrical power . . . . on all or any of the tramways authorised by the Blackpool and Fleetwood Tramroad Act, 1896. . . . ." Then follow certain regulations made for that same purpose—i.e., for securing the public against danger in consequence of the use of electrical power. Regulation No. V. at first sight seems again in favour of the appellants because it provides that "the Board of Trade and their Officers may, from time to time and shall on the application of the local authority . . . inspect the carriages used on the tramways, and the working arrangements generally, and may whenever they think fit, prohibit the use . . . . of any of them which, in their opinion, are not safe for use." That regulation, in my judgment, is intended only to cover the same ground as had appeared already in the First Schedule to the Act of 1896—namely, that the Board of Trade is to exercise supervision over those matters with a view to securing the safety of the public from danger arising from electrically propelled tramcars. On the other hand the power conferred on the local authority under the Tramways Act, 1870, to grant licences with respect to the tramcars and conductors and other persons having charge of the same may be exercised side by side with the powers given to the Board of Trade for totally different purposes. It may be necessary to make regulations and to provide by licence for the conveyance of the public in a tramcar as distinct from their safety. Therefore I find nothing inconsistent in these powers and I agree that the justices were right.

I desire to add nothing on the point as to whether the tramcar was a hackney carriage within the meaning of s. 45 of the Act of 1847 so as to justify the imposition of the penalty.

SANKEY J. I am of the same opinion.

Appeal dismissed.

Solicitors for appellants: *Nicholson, Graham & Jones, for J. R. Gaulter, Fleetwood.*

Solicitors for respondent: *Sharpe, Pritchard & Co., for A. Cottam, Fleetwood.*

NOTE.—Blackpool and Fleetwood Tramroad Act, 1896 (59 & 60 Vict. c. cxlvii.), s. 2: "The following Acts and parts of Acts (that is to say :—

. . . .

"Section 3 (interpretation of terms) and Parts II. and III. of the Tramways Act, 1870; so far as they are applicable to and are not expressly varied by or inconsistent with the provisions of this Act are incorporated with and form part of this Act and shall apply to the undertaking of the Company . . . . Provided further that the provisions of the Tramways Act, 1870, herewith incorporated shall apply only to the tramway by this Act authorised. . . . ."

Sect. 6 provides that subject to the provisions of the Act the company may "work use and maintain" in the lines the tramroad and tramway with all proper "rails . . . . shelters . . . . works and conveniences connected therewith. . . . ."

Sect. 7, sub-s. 8: "The Company at all times after the opening of the portion of the tramroad by this Act authorised between the commencement thereof and the road to the shore at Norbreck or any part thereof for public traffic shall if required by the corporation by notice in writing under the hand of the town clerk run carriages sufficient for passenger traffic from each extremity of such portion to the other over the whole length of such portion at least four times every day with intervals of not less than one hour between each journey if so required by the corporation as aforesaid between the hours of nine o'clock in the forenoon and nine o'clock in the afternoon."

By sub-s. 9 the tramways are to be connected with a certain portion of Tramway No. 8 authorized by the Blackpool Corporation Tramways Order, 1896, so as to form a continuous line.

Sect. 10, sub-s. 5: "The Company shall at all times after the opening of the tramroad run through cars every day except Sunday between the commencement of the tramroad within the borough of Blackpool as described in this Act and the terminus at Fleetwood at least four times every day in both directions. . . . . "

Sect. 38: "The Board of Trade may from time to time upon the application of the local authority or road authority require the company to adopt and apply such improvements in the tramway so far as the same is laid along the carriageway of any street or road under the control of such local authority or road authority as experience may from time to time suggest having regard to the greater security of the public and advantage to the ordinary traffic of such street or road and the company shall with all reasonable despatch comply with any order made by the Board of Trade for the purpose of carrying out such improvements."

Sect. 46: "The Company and any local or road authority may subject to the provisions of this Act from time to time enter into any agreements with respect to the mode of constructing and to the maintaining working removing renewing repairing and using of the tramway along or across any street or road situated within the district of such local or road authority and the rails plates chairs sleepers and works connected therewith and the facilitating of the traffic over and along the same."

Sect. 48: "If at any time the Board of Trade are of opinion that by reason of the increase of traffic on the tramroad or any road crossed by the tramroad on the level any alteration of the level crossings or the mode of working the same is expedient the company shall be subject to all such rules and regulations with regard to the mode of working such crossing as may from time to time be made by the Board of Trade. . . . ."

Sect. 57: "The carriages used on the tramroad and tramway may subject to the provisions of this Act be moved by animal power or by electric power or any mechanical power other than steam Provided always that the exercise of the powers hereby conferred with respect to the use of electric or mechanical power on the tramway shall be subject to the regulations set forth in the First Schedule to this Act and to any regulations which may be added thereto or substituted therefor respectively by any order which the Board of Trade may and which they are hereby empowered to make from time to time as and when they may think fit for securing to the public all reasonable protection against danger in the exercise of the powers by this Act

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conferred with respect to the use of electric or mechanical power on the tramway."

Sect. 60: "The company or any other company or person using any mechanical power on the tramway contrary to the provisions of this Act or to any of the regulations set forth in the First Schedule to this Act or to any regulation added thereto or substituted therefor by any order made by the Board of Trade under the authority of this Act shall for every such offence be subject to a penalty not exceeding ten pounds and also in the case of a continuing offence to a further penalty not exceeding five pounds for every day during which such offence continues after conviction thereof Provided always that whether any such penalty has been recovered or not the Board of Trade in case in their opinion the Company . . . . have made default in complying with the provisions of this Act or with any of the regulations set forth in the First Schedule to this Act or with any regulation which may have been added thereto or substituted therefor as aforesaid may by order direct the Company . . . . to cease to exercise the powers aforesaid and thereupon the Company . . . . shall cease to exercise the powers aforesaid and shall not again exercise the same or any of the same unless with the authority of the Board of Trade and in every such case the Board of Trade shall make a special report to Parliament notifying the making of such order."

Sect. 61: "Subject to the provisions of this Act the Board of Trade may from time to time make and when made may rescind annul or add to byelaws with regard to any part of the tramway upon which mechanical power may be used under the authority of this Act for all or any of the following purposes (that is to say) . . . For regulating the entrance to exit from and accommodation in the carriages used on the tramway and the protection of passengers from the machinery of any engine used for drawing or propelling such carriages;"

Sect. 63: "The provisions of the Tramways Act, 1870, relating to the making of byelaws by the local authority with respect to the rate of speed to be observed in travelling on the tramway shall not authorise the local authority to make any byelaws sanctioning a higher rate of speed than that authorised by this Act or by any regulation or byelaw made by the Board of Trade under the authority of this Act at which engines are driven or propelled on the tramway under the authority of this Act but the local authority may if they think fit make byelaws under the provisions of the Tramways Act, 1870, for restricting the rate of speed to a lower rate than that so prescribed."

"FIRST SCHEDULE.

. . . .

"AS TO CARRIAGES.

"Every carriage used on the tramway shall be so constructed as to provide for the safety of passengers and for their safe entrance to exit from and accommodation in such carriage and their protection from the machinery of any engine used for drawing or propelling such carriage.

"INSPECTION OF ENGINES AND CARRIAGES.

"The Board of Trade shall on the application of the local authority of any district in which the tramway is laid and may on complaint made by any person from time to time inspect any engine or carriage used on the tramway and the machinery therein and may whenever they think fit prohibit the use on the tramway of any such engine or carriage which in their opinion may not be safe for use on the tramway.

"AS TO SPEED.

"The speed at which engines trucks and carriages may be driven or propelled along any portion of the tramway which may be situate in any street or road shall not exceed the rate of eight miles an hour.

"The speed at which engines and carriages may pass through movable facing points on any street or road shall not exceed the rate of four miles an hour."

STATUTORY RULES AND ORDERS, 1899.

No. 169.

"TRAMWAY.

"Regulations, dated March 13, 1899, made by the Board of Trade as regards Electrical Power (Overhead Trolley System) on the Blackpool and Fleetwood Tramways. R. 3052/99.

"The Board of Trade, under and by virtue of the power conferred upon them in this behalf, do hereby order that the following regulations for securing to the public reasonable protection against danger in the exercise of the powers conferred by Parliament with respect to the use of electrical power (overhead trolley system) on all or any of the tramways authorised by the Blackpool and Fleetwood Tramroad Act, 1896, and on which the use of such power has been authorised (hereinafter called 'the tramways'), be substituted for all other regulations in this behalf contained in any Tramway Act or Tramway Order confirmed by Act of Parliament:

"And the Board of Trade do also hereby make the following byelaws with regard to all or any of such tramways worked on the overhead trolley system:

"REGULATIONS.

"I. Every motor carriage used on the tramways shall comply with the following requirements, that is to say:—

. . . .

"(*d*) It shall be numbered inside and outside, and the number shall be shown in conspicuous parts thereof.

. . . .

"(*h*) When running between sunset and sunrise, or during fog, it shall carry in front a bright light.

"II. Every trailing carriage used on the tramways shall comply with the following requirements, that is to say:

"(*a*) The wheels shall be fitted with brake blocks, which can be applied by a screw or treadle or by other means.

"(*b*) It shall be numbered inside and outside, and the number shall be shown in conspicuous parts thereof.

"IV. Every carriage used on the tramways shall be so constructed as to provide for the safety of passengers, and for their safe entrance to, exit from, and accommodation in such carriages, and for their protection from the apparatus used for drawing or propelling the carriages.

"V. The Board of Trade and their officers may, from time to time, and shall, on the application of the local authority of any of the districts through which the said tramways pass, inspect the carriages used on the tramways and the working arrangements generally, and may, whenever they think fit, prohibit the use on the tramways of any of them which, in their opinion, are not safe for use."

Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 22: "Part II. and Part III. of this Act shall apply to every tramway which is hereafter authorised by any provisional order or Act of Parliament, and shall be incorporated with such provisional order or Act, and all the said provisions of this Act, save so far as they shall be expressly varied or excepted by any such provisional order or Act, shall apply to the undertaking authorised thereby, so far as the same shall be applicable to such undertaking, and shall, with the provisions of every other Act or part of any Act which shall be incorporated therewith, form part of the said provisional order or Act, and be construed therewith as forming one provisional order or Act, as the case may be."

Sect. 48: "The local authority shall have the like power of making and enforcing rules and regulations, and of granting licenses with respect to all carriages using the tramways, and to all drivers, conductors, and other persons having charge of or using the same, and to the standings for the same, as they are for the time being entitled to make, enforce, and grant with respect to hackney carriages, and the drivers and other persons having the charge thereof, and to the standings for the same in the streets and district of or under the control of the local authority: Provided always, that in any district in which any of the powers aforesaid in relation to hackney carriages and the matters aforesaid in connexion therewith are vested in any authority other than the local authority of such district, such authority shall have and may exercise the powers by this section conferred upon the local authority."

Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 38: "Every wheeled carriage, whatever may be its form or construction, used in standing or plying for hire in any street within the prescribed distance, and every carriage standing upon any street within the prescribed distance, having thereon any numbered plate required by this or the special Act to be fixed upon a hackney carriage, or having thereon any plate resembling or intended to resemble any such plate as aforesaid, shall be deemed to be a hackney carriage within the meaning of this Act; and in all proceedings at law or otherwise the term 'Hackney carriage' shall be sufficient to describe any such carriage: . . . ."

Sect. 45: "If the proprietor or part proprietor of any carriage . . . . permits the same to be used as a hackney carriage plying for hire within the prescribed distance without having obtained a licence as aforesaid for such carriage . . . . every such person so offending shall for every such offence be liable to a penalty not exceeding forty shillings."

Town Police Clauses Act, 1889 (52 & 53 Vict. c. 14), s. 2, sub-s. 1: "This Act shall be construed as one with the principal Act" (i.e., the Town Police Clauses Act, 1847), "and the expression 'this Act' in the principal Act shall be construed to mean the principal Act as amended by this Act."

Sect. 3: "The term 'omnibus' where used in this Act shall include—

"Every omnibus . . . ; .

"But shall not include—

"Any tramcar or tram carriage duly licensed under the provisions of the Tramways Act, 1870, or of any provisional order made thereunder and confirmed by Parliament, or under the provisions of any local Act of Parliament: . . . ."

Sect. 4, sub-s. 1: "The several terms 'hackney carriages,' 'hackney coach,' 'carriages,' and 'carriage,' whenever used in sections . . . . forty to fifty-two (both inclusive) of the principal Act shall, notwithstanding anything contained in section thirty-eight of that Act, be deemed to include every omnibus."

J. E. A.

[IN THE COURT OF APPEAL.]

ELLIS *v.* TORRINGTON.

[1918. E. 489.]

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Nov. 3, 4.

Right of Action—Assignment—Maintenance and Champerty—Lease—Breach of Covenant to repair—Expiration of Lease—Assignment to Purchaser of Freehold.

A freehold messuage and tenement were the subject of the following leases: (1.) a head-lease which expired on December 25, 1917; (2.) an underlease which expired on December 18, 1917; (3.) a sub-underlease which expired on December 15, 1917. All three leases contained onerous covenants to repair the premises and to keep them and yield them up in good repair. The sub-underlease became vested by assignment in the defendant. On December 18, 1917, the plaintiff, who had been a tenant to the defendant of the same premises, and was liable to him under a covenant to repair less onerous than those in the three leases above mentioned, agreed to purchase, and on May 1, 1918, took a conveyance of the fee simple of the premises together with the benefit of the covenants in the head-lease. At the expiration of all the leases the premises were out of repair and the defendant was threatening the plaintiff with an action on his covenant. Thereupon the plaintiff obtained an assignment of the full benefit of the lessee's covenants to repair contained in the sub-underlease, and commenced an action against the defendant as assignee of the sub-underlease for breaches of the lessee's covenants therein:—

Held, that the assignment was free from objection on the ground of maintenance or champerty, the right of action on the covenants being so connected with the enjoyment of property as to be more than a bare right to litigate.

Williams v. *Protheroe* (1829) 2 M. & P. 779; *Dawson* v. *Great Northern and City Ry. Co.* [1905] 1 K. B. 260; and *Ogdens, Ld.* v. *Weinberg* (1906) 95 L. T. 567 followed and applied.

Prosser v. *Edmonds* (1835) 1 Y. & C. Ex. 481 and *May* v. *Lane* (1894) 64 L. J. (Q. B.) 236 commented upon.

Judgment of Sargant J. affirmed.

APPEAL from the judgment of Sargant J. sitting in the King's Bench Division.

The action was for damages for breach of a covenant to keep and leave a certain house and premises in repair. The plaintiff claimed as assignee of the benefit of the covenant.

The statement of claim contained the following allegations:—

1. By a deed dated October 24, 1898, made between Earle Tudor Johnson of the one part and Franz Voelklein of the other part the house and premises in question which were situate in the parish of Cookham in the county of Berks, and were then known as Felix Cottage, but now as Hazeldene, were let by E. T. Johnson to F. Voelklein from September 29, 1898, for a term of nineteen years and one quarter of another year except the last ten days thereof.

By the said deed F. Voelklein covenanted with E. T. Johnson that he would during the term well and substantially repair and keep in good and substantial repair in a workmanlike manner and with good materials the house and premises, damage by fire excepted, and also would save as aforesaid at his own cost in the second year and in every subsequent third year and in the last year of the term paint all the outside woodwork ironwork and other work belonging to the house and premises and all the inside woodwork in the fourth year and once in every subsequent seven years and in the last year and would colour whitewash and paper as therein provided and also would at the expiration of the term peaceably yield up the house and premises in good and substantial repair and condition in accordance with the covenants thereinbefore contained, damage by fire excepted.

2. The term subsequently became vested in the defendant.

3. E. T. Johnson died on March 29, 1917, and the reversion upon the term became vested in his executors.

4. While the defendant was assignee of the term the house and premises were out of such repair as was required by the covenants above mentioned, and at the end of the term they were yielded up by the defendant out of such repair.

5. By a deed dated September 17, 1918, the executors of E. T. Johnson, in consideration of the covenant hereinafter

mentioned, assigned to the plaintiff the full benefit of the covenants on the part of the lessee contained in the deed of October 24, 1898, together with the full right to recover receive and retain for his benefit all damages costs and other sums of money and all other relief for or in respect of any breach or breaches committed of the said covenants or any of them and also the right to bring, prosecute, compound, or release any action or proceeding in respect thereof and all other rights and powers whatsoever in connection therewith. And the plaintiff covenanted with the executors that he would at all times keep the executors and the estate of E. T. Johnson effectually indemnified against all actions and proceedings costs damages claims and demands in respect of any liability whatsoever on the part of E. T. Johnson or his estate or effects under the indenture referred to in the schedule, namely, an indenture of lease dated March 30, 1868, made between Albert Ricardo and E. T. Johnson, and referred to below.

Express notice of this assignment was given in writing to the defendant on September 18, 1918. The plaintiff claimed 334*l.*

The defendant submitted that the statement of claim disclosed no cause of action.

The following statement of facts is taken from the judgment of Sargant J.

By an indenture of lease dated February 12, 1868, hereinafter referred to as lease No. 1, the house and premises were demised by Cooper and others to Albert Ricardo from Christmas, 1867, for fifty years—i.e., to Christmas, 1917—at a rent of 96*l.* per annum, and there were covenants by the lessee to repair, to keep in repair, to do certain specified painting, and to yield up in good repair.

On March 30, 1868, a lease (lease No. 2) was executed by which Albert Ricardo, as lessee under lease No. 1, leased the premises to E. T. Johnson from Christmas, 1867, for fifty years less seven days—i.e., to December 18, 1917—at a rent of 45*l.* per annum. There were covenants by the lessee to repair and keep in repair, to do certain specified painting, and also to yield up in good repair. The language of those covenants was substantially identical with the language of the covenants in lease No. 1.

Some thirty years afterwards, on October 24, 1898, E. T. Johnson by a lease No. 3, demised the same property to F. Volklein from Michaelmas, 1898, for 19¼ years less ten days for a term expiring on December 15, 1917. This is the lease referred to in para. 1 of the statement of claim. It contained the covenant set out therein which was more or less, but not quite, the same, as the covenants contained in leases Nos. 1 and 2. There was an exception of damage by fire in the covenant to yield up. By September 29, 1909, lease No. 3 had got into the hands of one Leon as assignee, who in the same year assigned lease No. 3 to the defendant, Lady Torrington, by a deed of assignment containing the ordinary covenant by the assignee to indemnify the assignor against subsequent breaches of covenant in the lease.

On May 30, 1914, by a lease, No. 4, the defendant leased the premises to the plaintiff from June 24, 1914, for a term of 3½ years less twenty days, that is, to December 5, 1917. The covenants to repair in this lease were different from those in the other leases. They were covenants by which the lessee's liability for fair wear and tear were excepted. The plaintiff was in actual possession when lease No. 4 came to an end.

During the twenty days or so from December 5 to December 25, 1917, all the four leases expired.

On December 18, 1917, the plaintiff contracted with the successors in title of Cooper and others, the lessors under lease No. 1, to purchase the freehold of the premises, and it was part of the terms of the purchase that the plaintiff should have assigned to him the benefit of the covenants by the lessee contained in lease No. 1. The purchase was actually completed on May 1, 1918. On that day two indentures were executed ; by one of which the freeholders conveyed the fee simple of the premises to the plaintiff, and by the other of which the freeholders conveyed to the plaintiff the full benefit of the lessee's covenants in lease No. 1, together with the right to sue in respect thereof. Thus the plaintiff was entitled to sue Ricardo or his representatives for breaches by the lessee of the covenants in lease No. 1. Ricardo or his representatives if sued by the plaintiff could, and probably would, sue the executors of E. T. Johnson, who had died on March 29, 1917, for breaches of the almost identical covenants in lease No. 2, and Johnson's executors in their turn could sue the defendant on the covenants in lease No. 3. The defendant was already seeking to recover from the plaintiff under his covenants in lease No. 4.

In these circumstances the representatives of E. T. Johnson executed the assignment mentioned in para. 5 of the statement of claim as set out above.

The question was whether that assignment was valid.

Sargant J. gave judgment for the plaintiff.

The defendant appealed.

Gover K.C. and *Foà* for the appellant. The assignment of September 17, 1918, was void because it offended against the law of maintenance and champerty. A bare right of action for unliquidated damages cannot be validly assigned. In the case of a right of action for a tort this is quite clear: *Defries* v. *Milne* (1); and the same is true of rights of action generally. " It is a rule—not of our law alone, but of that of all countries, that the mere right of purchase shall not give a man a right to legal remedies. The contrary doctrine is nowhere tolerated, and is against good policy. All our cases of maintenance and champerty are founded on the principle that no encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce " : *Prosser* v. *Edmonds* (2), per Lord Abinger C.B., approved in the House of Lords in *Neville* v. *London "Express" Newspaper, Ld.* (3) Authorities to the same effect are *May* v. *Lane* (4), and *Torkington* v. *Magee* (5) where Channell J. says that in his view the Court of Chancery before the Judicature Acts would not give effect to

(1) [1913] 1 Ch. 98.
(2) 1 Y. & C. Ex. 481, 497.
(3) [1919] A. C. 368.
(4) 64 L. J. (Q. B.) 236.
(5) [1902] 2 K. B. 427.

"a mere right to litigate." The principle is recognized in *Fitzroy* v. *Cave* (1), though debts, being now regarded as property, are excepted from its operation; and again in *Glegg* v. *Bromley* (2), where the Court distinguished between an assignment of a right of action and an assignment of the proceeds of the action. Certain exceptions to this rule have been allowed; first, by statute; rights of action, which are the property of a bankrupt, are transferred to his trustee in bankruptcy, and then the trustee may assign them: *Seear* v. *Lawson* (3); *In re Perkins* (4); *British Union and National Insurance Co.* v. *Rawson* (5); *Ogdens, Ld.* v. *Weinberg.* (6) Secondly, a right of action may be assigned if it is incidental or subsidiary to a conveyance of property: *Williams* v. *Protheroe* (7); *Dawson* v. *Great Northern and City Ry. Co.* (8). The first exception has no possible application to this case. The second is not applicable, because the assignment was not incidental or subsidiary to a conveyance of property. The lease of October, 1898, to which the covenants said to be assigned might have been incidental or subsidiary, had expired ten months before the assignment. *Williams* v. *Protheroe* (7) is distinguishable. There the lease was running when the benefit of the covenant was assigned; the action for dilapidations had been commenced, and the plaintiff in that action was the assignor himself. In this case the assignment was long after the lease had terminated; no action on the covenant assigned had been commenced or meditated. The subject of this assignment was a bare cause of action. E. T. Johnson's executors ceased to have any further interest in the property when their lease expired in December, 1917. They were not putting the covenant in suit themselves. This is a specimen of the class of assignments which the law refuses to recognize—namely, where a person, having a claim which he forbears to prosecute, assigns it to another who has no such scruples. The learned judge was benevolently disposed towards the assignment in that it led by a short route to

(1) [1905] 2 K. B. 364.
(2) [1912] 3 K. B. 474.
(3) (1880) 15 Ch. D. 426.
(4) [1898] 2 Ch. 182.
(5) [1916] 2 Ch. 476.
(6) 95 L. T. 567.
(7) 2 M. & P. 779.
(8) [1905] 1 K. B. 260.

the liability of the person ultimately responsible for the dilapidations. But an assignment of a mere right of action has never been upheld on the sole ground that it avoided circuity of action. The fact that the respondent has purchased the freehold from a third person does not validate this agreement. If it did, it would equally sustain an assignment of a right of action at the suit of E. T. Johnson against a decorator who, having undertaken to execute repairs to the premises, had failed in the due performance of his contract. An assignment of a right of action can be valid as being incidental and subsidiary to a conveyance of property only when the conveyance and the assignment are by the same person.

Schiller K.C. and *Willoughby Williams* for the respondent were not called on.

Bankes L.J. It is obvious that the appellant could have been made responsible for breaches of covenant in the underlease of which she was assignee, if the freeholder had brought an action against his lessee Ricardo or his representatives, and Ricardo or his representatives had brought an action against E. T. Johnson, and E. T. Johnson had brought an action against the appellant. It is therefore in the public interest that the short cut which the respondent is taking in this action should be permissible, in order to avoid circuity of action. But if there is any valid objection to it the law will not permit it. It is said that there is a valid objection in that the assignment of September 17, 1918, from E. T. Johnson's executors to the respondent was an assignment of a bare right of action for damages for breach of contract and, as such, unenforceable. Now in considering this argument the first thing to do is to ascertain the principle on which is based the rule that a bare right of action for damages is not assignable either in law or in equity. We have been referred to a number of cases, but I think the principle is best stated in the judgment of Parker J. sitting as a member of the Court of Appeal in *Glegg* v. *Bromley*. (1) He says: "Ordinary choses in action were not assignable at law, but

(1) [1912] 3 K. B. 474, 489.

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were, generally speaking, assignable in equity whether themselves legal or equitable choses. In the former case equity compelled the assignor to allow his name to be used for their recovery in legal proceedings, in the latter case the assignee could sue in equity in his own name. There was one exception to this rule. Equity on the ground of public policy did not give validity to the assignment of what is in the cases referred to as a bare right of action, and this was so whether the bare right were legal or equitable. I have looked at a good many authorities on that point, and I am satisfied that the real reason why equity did not allow the assignment of a bare right of action, whether legal or equitable, was on the ground that it savoured of or was likely to lead to maintenance. There is no doubt in the cases about the rule, and there is no doubt in the cases with regard to the exception, but difficulties often arose in deciding whether a particular right was within the exception or was within the rule." The rule then that a bare right of action for damages is not assignable (which Parker J. treats as an exception to a wider rule) rests on the principle that the law will not recognize any transaction savouring of maintenance or champerty. The next question is what is the exception to this rule? The exception is where the assignee can establish that he has an interest in the suit. Of the instances to which we have been referred the first is *Williams* v. *Protheroe*. (1) Mr. Foà has pointed to several distinctions in point of fact between that case and the present, but the importance of the case is its recognition of the interest of the assignee as being sufficient to sustain his claim. Best C.J. there said (2): "Here, the agreement was to enable a bona fide purchaser of an estate to recover rents due and in arrear; and, also, to recover for injuries or dilapidations previously to the purchase. The agreement applies to by-gone rents, for which suits had been instituted and commenced by the vendor; and, to say that the agreement as to the sum to be recovered for past dilapidations, is champerty, would be carrying the law further than was ever done in ancient times, when it was necessary for the then existing state of society." It was held then that the purchase of an estate conferred on the purchaser an interest sufficient to validate an assignment of a right of action for damages for breach of a covenant to repair the premises, and that the law of champerty could not be invoked to defeat his rights under the assignment. The next case is *Dawson* v. *Great Northern and City Ry. Co.* (1) Again that case differed from this in its facts, but the language of Stirling L.J. in giving his reasons for holding the action maintainable is very applicable to the present case. He said (2): "Even if the assignment be regarded apart from the conveyance of the lands and buildings comprised in the deed of August 17, 1901, it appears to us that it is good; but we think that great weight must be given to the circumstance that this assignment is incidental and subsidiary to that conveyance, and is part of a bona fide transaction the object of which was to transfer to the plaintiff the property of Blake with all the incidents which attached to it in his hands. Such a transaction seems to be very far removed from being a transfer of a mere right of litigation." In my opinion the assignment in the present case was, in the words of Stirling L.J., "incidental and subsidiary" to the conveyance of the property. It is true that in this case the conveyance of the property and the assignment of the right of action were made by different persons, but I fail to see what difference in principle that makes when the test is whether the transaction incurs or avoids the charge of maintenance and champerty. The next case to which I would refer is *Ogdens, Ld.* v. *Weinberg* (3), where the House of Lords, and particularly Lord Davey, dealt with the question whether a particular assignment was an assignment of a bare right of action for damages and held that it was not, because, as Lord Davey expressed it, the contract was clearly one which appertained to the business. Guided by those three cases I approach the question, Is there anything in the facts of this case to justify the Court in holding that, notwithstanding

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(1) 2 M. & P. 779.

(2) 2 M. & P. 779, 787.

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(1) [1905] 1 K. B. 260. (2) Ibid. 271.
(3) 95 L. T. 567.

Bankes L.J.

the respondent's interest, this action was champertous and the assignment of September 17, 1918, unenforceable? I think not. In my opinion Sargant J. was perfectly right when he said that the rights of action for breaches of covenant by the appellant were sufficiently connected with the enjoyment of the property to escape being bare rights of action within the meaning of that phrase as used by Parker J. in *Glegg* v. *Bromley.* (1) The respondent is seeking to enforce a right incidental to property, a right to a sum of money which theoretically is part of the property he has bought. I see nothing material in the fact that, owing to the various dealings with this property, he had to take the assignment from an underlessee. His position is in the eye of the law the same as if he had been able to bring this action under the assignment which he took from the original freeholder. On these grounds I think the judgment of Sargant J. was right and this appeal must be dismissed.

Warrington L.J. I am of the same opinion. The question is whether in the particular circumstances of this case an assignment to the respondent of the benefit of certain covenants to repair, for the performance of which the appellant is liable, is a valid assignment conferring on the respondent a right to sue for damages. The appellant contends that the assignment was an assignment of a bare right of action, that is, an assignment of a right to recover damages for a past breach of contract; that it is therefore obnoxious to the law against champerty and maintenance, and consequently, according to settled principles of law, void.

[The Lord Justice then stated the facts, and proceeded:] The question is, Is that assignment a valid assignment, as Sargant J. has held it to be, or is it void under the rules which prevent an assignment of a bare chose in action? The principle to be applied in solving this question is stated very neatly and completely by Parker J., then sitting in the Court of Appeal in *Glegg* v. *Bromley.* (2) The passage has been cited by Bankes L.J. and I do not propose to read the whole of it again. The effect of it is that as a general rule all choses in action are assignable in equity, though they were not assignable at law. To that rule there is an exception, namely, that a bare right of action is not assignable. Then follows a passage in which Parker J. states the reason why both in law and equity such assignments were held to be invalid. I think it is worth while to read that passage again. Parker J. says: "I have looked at a good many authorities on that point, and I am satisfied that the real reason why equity did not allow the assignment of a bare right of action, whether legal or equitable, was on the ground that it savoured of or was likely to lead to maintenance." Then after saying that there was no doubt about the rule or about the exception, but that difficulties often arose in deciding whether a particular right was within the exception or was within the rule, the learned judge proceeded: "The question was whether the subject matter of the assignment was, in the view of the Court, property with an incidental remedy for its recovery, or was a bare right to bring an action either at law or in equity." In *Dawson* v. *Great Northern and City Ry. Co.* (1) Stirling L.J. said: "Although, as is laid down by Lord Macnaghten in advising the House of Lords in *Tolhurst* v. *Associated Portland Cement Manufacturers* (2), 'It is well settled that as a general rule the benefit of a contract is assignable in equity and may be enforced by the assignee,' yet a Court of equity is as much bound as a Court of common law by the law relating to champerty and maintenance, and if an assignment of a chose in action is obnoxious to that law it is bad in equity no less than at law. An assignment of a mere right of litigation is bad: *Prosser* v. *Edmonds* (3); but an assignment of property is valid, even although that property may be incapable of being recovered without litigation." I have referred to those passages because they lead back to the source of the objection both in law and in equity to the assignment of a right of action. Does that apply to the present case? To eliminate the immaterial, suppose the transaction

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(1) [1912] 3 K. B. 474.

(2) [1912] 3 K. B. 474, 489, 490.

(1) [1905] 1 K. B. 260, 270.
(2) [1903] A. C. 414, 420.
(3) 1 Y. & C. Ex. 481.

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had been this: A purchase by the respondent from the then freeholders with the benefit of Ricardo's covenants, Ricardo himself being a party to that conveyance in order to assign the benefit of the covenants contained in E. T. Johnson's underlease, and so joining in pursuance of an agreement between him and the purchaser that the purchaser, instead of suing Ricardo and leaving Ricardo to bring a separate action against E. T. Johnson, should have direct recourse to Ricardo's right of action against E. T. Johnson. If Johnson were the person ultimately liable, what possible objection on the ground of champerty or maintenance could there be to that? Interest, sometimes of a most shadowy nature, in the subject matter was sufficient to save a transaction from the imputation of maintenance. In the case I have put, Ellis, the purchaser, would have had ample interest in the subject matter to justify an assignment to him of the benefit of E. T. Johnson's covenants to repair; considerations which would validate an assignment by Ricardo of his rights against E. T. Johnson would equally validate an assignment by E. T. Johnson's executors against Voelklein or the assignee of his sub-underlease. It follows that in the circumstances of this particular case the interest of the assignee is sufficient to relieve the assignment from any objection based on the ground that it was an assignment of a bare right of action and as such void in law and in equity. The judgment of Sargant J. was right and ought to be affirmed.

SCRUTTON L.J. On a careful consideration of the authorities which have been cited to us I find no principle of law to countenance the objection taken to this assignment. The objection is this: The appellant's lessor has assigned to the present owner of the property the right to sue on the appellant's covenant to keep the premises in repair or pay damages; it is said that this assignment is impossible because it contravenes the law of champerty and maintenance. It is elementary knowledge that for a long time Courts of common law and Courts of equity differed as to how far choses in action, and particularly causes of action, could be assigned. The common law treated debts as personal obligations and assignments of debts merely as assignments of the right to bring an action at law against the debtor and, except in a strictly limited number of cases, did not recognize any such assignments. Courts of equity always took a different view. They treated debts as property, and the necessity of an action at law to reduce the property into possession they regarded merely as an incident which followed on the assignment of the property. I am stating the effect of the judgment of Cozens-Hardy L.J. in *Fitzroy* v. *Cave.* (1) But there came a point on which both Courts would have agreed; to assign a bare right of action, a bare power to bring an action was not permitted in either Court; and the reason was as pointed out by Warrington L.J. that both Courts treated such an assignment as offending against the law of maintenance or champerty or both. But early in the development of the law the Courts of equity and perhaps the Courts of common law also took the view that where the right of action was not a bare right, but was incident or subsidiary to a right in property, an assignment of the right of action was permissible, and did not savour of champerty or maintenance. In *Glegg* v. *Bromley* (2) Parker J. defined the exception in this way: "The question was whether the subject matter of the assignment was, in the view of the Court, property with an incidental remedy for its recovery, or was a bare right to bring an action either at law or in equity." Stirling L.J. in *Dawson's Case* (3) defined it in these words: "We think that great weight must be given to the circumstance that this assignment is incidental and subsidiary to that conveyance, and is part of a bona fide transaction the object of which was to transfer to the plaintiff the property of Blake with all the incidents which attached to it in his hands." I will cite one case more, *Dickinson* v. *Burrell* (4), which has been approved in later cases. There Dickinson, having conveyed property by a deed which was voidable in equity, made a second conveyance of the same property by a valid deed. It was held that the second deed carried with it the right to set aside the voidable deed. Lord Romilly M.R. said, "The distinction is this: if James Dickinson sold or conveyed the right to sue to set aside the indenture of December, 1860, without conveying the property, or his interest in the property, which is the subject of that indenture, that would not have enabled the grantee, A. B., to maintain this bill; but if A. B. had bought the whole of the interest of James Dickinson in the property, then it would. The right of suit is a right incidental to the property conveyed." Those three cases state in various ways the exception which the Courts have recognized to the rule that a bare right of action cannot be conveyed because it savours of champerty and maintenance. The exception and the limits defining it are easily apprehended when the nature of champerty and maintenance is considered. Many acts used to be regarded as acts of maintenance which are not so regarded now. Hawkins in his Pleas of the Crown gives many instances which no one now would think of calling maintenance. Lord Haldane in *Neville* v. *London "Express" Newspaper, Ld.* (4) said: "It is unlawful for a stranger to render officious assistance by money or otherwise to another person in a suit in which that third person has himself no lega interest, for its prosecution or defence." Champerty is only a particular form of maintenance, namely, where the person who maintains takes as a reward a share in the property recovered. When the person who assists is himself interested in the subject matter of the suit before its commencement there is neither champerty nor maintenance. Three owners of property may assist one of them in suing to protect the property and may share in what is recovered. This is neither maintenance nor champerty, because none of the three has a bare right of action. Each has a right of action relating to his interest in the property. So in this case when the respondent, who had bought the freehold, took also an assignment of the right to recover damages for dilapidations against the first lessee, he was not buying in order merely to get a cause of action; he was buying property and a cause

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(1) [1905] 2 K. B. 364.

(2) [1912] 3 K. B. 474, 490.

(3) [1905] 1 K. B. 260, 271.

(4) (1866) L. R. 1 Eq. 337, 342.

(1) [1919] A. C. 368, 390.

of action as incidental thereto. That assignment seems clearly to be protected by the principle of *Williams* v. *Protheroe.* (1) The next step is this: if, starting with a valid assignment of the lease, he had sued the first lessee, who had sued the second lessee, who had sued the third lessee, there would have been three actions the last of which would have established the liability of the appellant. Instead of that the respondent by taking an assignment of the action against the third lessee reaches the same result by one action instead of the complicated formalities of three. For these reasons I think the objection taken to this assignment is without foundation.

I wish to add this: There are two much-quoted cases which must in future be accepted with caution. The dictum in *Prosser* v. *Edmonds* (2) would be much modified if that case were decided now for the first time. Secondly, it is not of much use to cite *May* v. *Lane* (3) at the present day without citing the cases in which it has been explained. The judgment of Rigby L.J. is generally cited without reference to the facts of the case. It ought to be taken with the qualification placed upon it in *Torkington* v. *Magee.* (4) I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitor for appellant: *C. E. W. Ogilvie.*
Solicitors for respondent: *Cutler & Allingham.*

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(1) 2 M. & P. 779.
(2) 1 Y. & C. Ex. 481.
(3) 64 L. J. (Q. B.) 236.
(4) [1902] 2 K. B. 427.

W. H. G.

[IN THE COURT OF APPEAL.]

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Oct. 27;
Nov. 10.

DUTTON *v.* SNEYD BYCARS COMPANY, LIMITED.

Employer and Workman—Compensation—Industrial Disease—Non-scheduled Disease—Agreement to treat as within Schedule—Estoppel—Arbitration Proceedings—Jurisdiction of County Court Judge—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 3; *Sched. III.*

The statutory jurisdiction conferred on a county court judge sitting as an arbitrator by the Workmen's Compensation Act, 1906, cannot be enlarged by agreement between the parties nor by estoppel by conduct of either of them.

A disease not mentioned as an industrial disease in Schedule III. to the Act or in the orders extending the operation of that Schedule cannot therefore be brought within the limits of that jurisdiction either by agreement or estoppel.

Standing v. *Eastwood & Co.* (1912) 5 B. W. C. C. 268 followed. *Fraser* v. *Driscoll* (1916) 9 B. W. C. C. 264 commented on.

APPEAL from an award of the judge of the Burslem County Court, sitting as an arbitrator under the Workmen's Compensation Act, 1906.

The following statement of facts is taken in substance from the written judgment of Warrington L.J. The applicant was employed as a labourer at the respondents' poison-gas factory. The factory was a controlled establishment under the Ministry of Munitions. It was stated that with regard to compensation under the Act the Ministry assumed towards the employer a position which was practically that of an insurance company. The applicant was affected by gas-poisoning, and was on July 5, 1916, thereby incapacitated for work. For seven or eight weeks he was paid full wages. Then for several weeks he was paid a weekly sum calculated in accordance with the Act with an addition of 7*s.* as a subsistence allowance. After this he was employed for some time by a colliery company at light work, and received from the respondents varying weekly sums. This continued until January, 1919. Thenceforth he received 10*s.* a week until May 31, 1919. Since that date he had received nothing, the matter being then the subject of litigation. During the latter half of 1917 and the first few months of 1918 the only

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receipts produced were receipts for certain sums written on the backs of doctor's certificates of disablement, and they contained no reference to the Act. For certain payments in May and June, 1918, the applicant signed a receipt on a form which described the sums received as being for sick pay. As from June, 1918, another form was used (hereinafter referred to as the buff form), which was in the following terms. It was headed "Workmen's Compensation. Receipt for Weekly Payments." The body of it was as follows: "Received . . . . the sum of . . . . pounds . . . . shillings and . . . . pence, being compensation at the rate of . . . . shillings and . . . . pence, for the period of . . . . weeks ending . . . . 19 . . which is the amount due to me under the Workmen's Compensation Act, 1906, for the period named in respect of," and then alternatively "a personal injury by accident sustained" or "an industrial disease contracted by me on or about . . . . day of . . . . 19 . . " and that had to be signed by the applicant. During part of 1918 the applicant was also required to sign a declaration headed "Munitions Finance Form W. C. A. 3." The declaration was in the following terms: "I hereby declare that I am entitled to compensation under the Workmen's Compensation Act, 1906, for the . . . . weeks ending . . . . 19. . in respect of incapacity for work resulting from employment at . . . . " Then followed a paragraph for inserting "Name and address of present employer (if any)," "Earnings during period," and other particulars. That form was signed by the workman and had appended to it a certificate that the man was still living to be signed either by a minister of religion, magistrate, qualified medical practitioner, or other responsible person.

It was admitted that the applicant was suffering from gas-poisoning resulting from his employment; that the disease was one which was not scheduled to the Act as an industrial disease; and that he had not obtained a certificate of a certifying surgeon under s. 8 of the Workmen's Compensation Act, 1906. It was contended, however, on his behalf that the respondents were estopped by their conduct from denying that the case came within the Act.

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The county court judge held that the estoppel was established and made an award in favour of the applicant of 1*l*. 1*s*. 3*d*. a week.

The respondents appealed.

H. D. Samuels (*Branson* with him) for the respondents. The county court judge was wrong in holding that there was an estoppel in this case. The mere fact that the respondents paid the applicant compensation calculated by reference to compensation to which he would have been entitled if within the Act and required him to sign receipts which referred to the Act is not sufficient to estop them from denying that he is within the Act. The present case is distinguishable from *Fraser* v. *Driscoll*. (1) There there was a complete admission of liability within the Act, and the decision proceeded on that ground. The present case is governed by *Standing* v. *Eastwood & Co.* (2), which is practically on all fours with it. There it was held that the jurisdiction of the county court judge could not be enlarged by means of an estoppel so as to enable the county court judge to award compensation for an accident to a workman against persons who were not in fact his employers at the time of the accident. See also *Harrison* v. *Featherstone*. (3) If the decision of the county court judge here is right it would render it difficult for an employer to make any payments under the Act for, in so doing, he would prevent himself from setting up the truth of his case in subsequent arbitration proceedings.

[ATKIN L.J. referred to *Goodsell* v. *Owners of S. B. Lloyd*. (4)]

The only question there was whether the agreement in question was genuine.

[WARRINGTON L.J. The agreement, if proved, must be that the disease was to be treated as one within the Act, or that the accident was to be treated as an accident arising from a disease within the Act.

It is not alleged that there was here any such agreement. The payments made by the respondents were mere voluntary

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(1) 9 B. W. C. C. 264.
(2) 5 B. W. C. C. 268.
(3) (1916) 10 B. W. C. C. 54.
(4) (1914) 7 B. W. C. C. 631.

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payments. There being therefore neither estoppel nor agreement the award ought to be set aside.

A. B. Whitfield for the applicant. It is not suggested in this case that there is an absolute admission of liability as in *Fraser* v. *Driscoll* (1), but it is submitted that there is an estoppel by conduct resulting from the way in which the payments were made to the applicant and from the form of the receipts he was required by the respondents to sign. In *Fraser* v. *Driscoll* (1) the difficulty was the same as in the present case. The Court having found that the applicant was a casual labourer and therefore outside the Act, must have found some agreement by which he was to be included within it. Instead of an actual admission of liability as there was in that case there are here a long series of acts which can only be attributed to such an admission.

The position with reference to the form of the receipts and payments must be looked at from the applicant's point of view and not from that of the respondents'.

[ATKIN L.J. Can a workman be estopped by his conduct ?]

Yes : *Mackay* v. *Rosie.* (2)

[ATKIN L.J. That was a case of election. Estoppel and election are different things. I do not see how an agreement can be made except by the workman recording it.

WARRINGTON L.J. If you rest your case on estoppel you will have to prove a representation on the part of the respondents and that the applicant acted upon it to his detriment. Here there is no evidence of a representation.]

Until May, 1919, there was nothing to disabuse the applicant's mind of the belief that he was receiving compensation under the Act. Had he known that it was not so he might have been in a position to prove that the gas-poisoning was the result of an accident due to the respondents' defective plant.

[WARRINGTON L.J. The applicant alleges that the gas-poisoning was due to the nature of the employment. He says nothing about the negligence of the respondents.]

The Court should combine the forms of the declarations

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(1) 9 B. W. C. C. 264.

(2) (1907) 1 B. W. C. C. 52.

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with those of the receipts, particularly those in the buff form. By reason of the representations contained in the forms the applicant was lulled into the belief that he was receiving compensation under the Act and was thereby prevented from adducing definite evidence in support of his claim and in that way altered his position for the worse. That has in it all the elements of an estoppel.

H. D. Samuels replied.

Cur. adv. vult.

Nov. 11. The following judgments were delivered.

WARRINGTON L.J. The applicant in this case claims compensation for an alleged disability to earn wages occasioned by disease contracted whilst in the respondents' employment and due to the nature of that employment. It is admitted that the disease (gas-poisoning) which he says has occasioned his disability is not one of the diseases a sufferer from which is entitled to compensation under the Workmen's Compensation Act, 1906. Moreover, he has not obtained the certificate of a certifying surgeon, which under s. 8 of the Act is a condition precedent to his right to compensation. He is, therefore, clearly not under the Act entitled to claim compensation. But he says that the respondents are by their conduct estopped from denying that he is so entitled, or, alternatively, have agreed that as between him and themselves he shall be treated in all respects, including the right conferred by the Act of proceeding by arbitration before the county court judge, as if he had been so entitled. The county court judge has accepted the contention that the respondents are estopped from denying the title of the applicant and has made an award in his favour. The respondents appeal. [His Lordship then stated the facts, and referring to the declaration headed W. C. A. 3, continued :] The county court judge has assumed that W. C. A. 3 means "Workmen's Compensation Act, Schedule III." There is, in my opinion, no foundation for such an assumption; that it is not true is shown by the fact that the buff form of receipt has at the top the same initials followed by the figure 4, showing that the figures merely indicate the position in a series of official forms of those in question. The contention already referred to of the applicant is founded on these documents. It appears by the correspondence between the Treasury Solicitor and the solicitor for the applicant that the Ministry of Munitions while insisting that gas-poisoning is not a disease within the Act are willing, as an act of grace, to pay compensation on the lines of the Act.

If effect were given to the contention of the applicant the result would be to bring within the Act a man who is admittedly and clearly not within it, and, amongst other things, to enlarge the limited jurisdiction conferred by statute upon a county court judge. In order to constitute an estoppel by conduct the conduct alleged must amount to a representation of a certain fact intended to be acted on, and in fact acted on, to his prejudice by the man to whom it was made. In my judgment there was no evidence before the learned judge sufficient to justify his finding that there was an estoppel.

Then it is said that there was an agreement that the man should be treated in all respects as if he were within the Act. I fail to see any such agreement in fact. The calculation of the amount payable in the manner provided by the Act is consistent with the payment being voluntary, and the signature by the applicant of forms submitted to him by the respondents which contained a reference to the Act carries the matter no further. By submitting these forms the respondents do no more than wrongly describe the money that they were paying, and they do not state or lead the man to the belief that they intend to treat him as entitled to compensation if he is in fact not within the Act. There is, moreover, a serious question whether an agreement to pay compensation can be enforced unless it has been recorded under the Act (see Adshead Elliott on the Workmen's Compensation Act, 7th ed., p. 453). I prefer to say nothing on this point for, in my opinion, even if there were in fact an agreement and if it had been recorded it could not have the effect contended for by the applicant. The operation of the Act is confined to a certain class of cases,

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and it seems to me that the parties cannot by any form of estoppel or by agreement so enlarge the operation of the Act as to bring within it other cases, or to extend the limited statutory jurisdiction to those cases. In *Standing* v. *Eastwood & Co.* (1) Fletcher Moulton L.J. says: "The county court judge sitting as an arbitrator may be considered to be a Court of limited jurisdiction. It is well-settled law that no one can enlarge the jurisdiction of such a Court by contract, and it is equally clear that he cannot do so by estoppel which is fact based on contract." I am not sure that I quite understand the expression "fact based on contract," and the learned Lord Justice has probably been imperfectly reported. The words may well mean that the effect of estoppel is to bind the person estopped to assume the existence of a certain state of facts in the same way as if he had contracted so to assume. Of course, if some particular fact alleged by either party is in issue and either in accordance with the practice of the Court, as in the case of admissions in the pleadings or by the application of some rule of law, it has to be taken to be as alleged, it will be so taken although the result may be not in accordance with the true state of the facts. *Fraser* v. *Driscoll* (2) may appear to go further, and it is a little difficult to understand why an admission not made in the pleadings was treated as conclusive. The report is very short. The question I have dealt with above was not argued or even raised, and I cannot regard the decision in that case as an authority binding on the Court to decide otherwise than in accordance with the view I have expressed.

On this ground I am of opinion that the judge should have dismissed the application. This appeal must be allowed and an award made in the respondents' favour.

ATKIN L.J. The Workmen's Compensation Act, 1906, gives to a workman the right to compensation where personal injury is caused to him by accident arising out of and in the course of his employment. It further provides, by s. 1, sub-s. 3, that "If any question arises in any proceedings under

(1) 5 B. W. C. C. 268, 271.

(2) 9 B. W. C. C. 264.

this Act as to the liability to pay compensation . . . . or as to the amount or duration of compensation under this Act, the question, if not settled by agreement, shall . . . . be settled by arbitration, in accordance with the Second Schedule to this Act "—that is speaking generally by the county court judge. The right to compensation and the reference to the county court judge as arbitrator are entirely created by the statute. Employer and workman can not by agreement give one another rights under the Act which are not given by the Act; nor can they give to the county court judge jurisdiction to determine under the Act disputes which are not under the Act.

In this case the applicant suffered from an illness contracted in the course of his employment. He was not injured by an accident; and the illness was not one of the diseases brought within the Act by s. 8, and the Third Schedule. Under these circumstances, in my opinion, it was not competent for the employer and workman by conduct or agreement to give jurisdiction to the county court judge to award compensation under the Act. It is entirely different where the parties determine by agreement questions that arise within the Act, e,g., whether a person injured is a workman to whom the Act applies, whether he was injured by accident, whether the accident arose out of, or in the course of, his employment, what the amount of the compensation should be. In such cases the agreement of the parties operates within the ambit of the Act. In the present case the suggested agreement or estoppel seeks to operate outside the Act, and to entitle the applicant to the exercise of statutory jurisdiction and give him statutory relief in circumstances where the statute has not given relief or jurisdiction. If there be any agreement between the parties it must be enforced by action at law and not by arbitration under the Workmen's Compensation Act. For these reasons it appears to me that the relief sought is misconceived and that the appeal should be allowed.

It is unnecessary to consider whether in a case falling within the Act there is place for the doctrine of estoppel in establishing liability; or whether the right view is not that the parties

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must rely on an agreement within the Act; and if so whether such agreement to be valid must not be recorded in a registered memorandum. I mention these points to make it clear that they have not been overlooked, and in this case have not been decided.

EVE J. I agree that the appeal in this case must be allowed. The application of the workman is based on the allegation that on July 5, 1916, he contracted gas-poisoning, "a disease coming within s. 8 of the Workmen's Compensation Act, 1906," when employed as a labourer at the respondents' poison-gas factory, and on this allegation a request is founded for arbitration as to the liability of the respondents to pay compensation under the Act in respect of the said disease, and as to the amount of the compensation so payable. An examination of the Act and Sched. III., and of the Orders extending the operation of that Schedule having demonstrated that the disease contracted by the applicant is not one which brings his case within the Act, the question arises whether the county court judge had any jurisdiction to proceed with the arbitration. Prima facie he had not, inasmuch as the proceedings initiated by the applicant's request for arbitration could no longer be treated as proceedings under the Act when once it was established that the case was one to which the Act had no application. But then it is said that the respondents had either agreed with the applicant to treat him as though he had contracted a disease arising within the Act or had so conducted themselves towards him as to estop them from asserting that he was not within the Act. I can see no evidence upon which either of these contentions can be sustained. It is not suggested that the mere payment of compensation constituted evidence of an implied agreement or sufficed to raise a case of estoppel, but reliance is placed on the wording of some of the receipts signed by the applicant, where payments were made to him by the respondents. We have had an opportunity of considering these documents, and I can only say that I can see nothing in them which raises any implication of an agreement or creates any estoppel. In my opinion no case of one or the other was made out, and the application ought to have been refused.

I would further add that if an agreement had in fact been established I do not think it could have been enforced in proceedings under the Act. It is not competent by agreement inter partes to extend the statutory jurisdiction under the Act to cases outside the Act, and, even if an agreement such as was asserted by the applicant in this case had been established, it could not have been enforced by the procedure adopted but must have been made the subject of an action.

Appeal allowed.

Solicitor for respondents: *The Treasury Solicitor.*

Solicitors for applicant: *M. A. Orgill for Alcock & Abberley, Burslem.*

W. I. C.

[IN THE COURT OF APPEAL.]

FROST *v.* CLANWAY COLLIERY COMPANY, LIMITED.

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Oct. 29, 30; Nov. 10.

Employer and Workman—Injury by Accident—Industrial Disease—Certificate of certifying Surgeon—Date of Disablement—Appeal to Medical Referee—Allowance of Appeal—Finality—Further Certificate of certifying Surgeon to same Effect—Invalidity—Workmen's Compensation Act, 1906 (6 *Edw.* 7, c. 58), *s.* 8, *sub-ss.* (1.) iii. (*f*), (4.)—*Regulations of Secretary of State and Treasury—Schedule, Form* 15.

Where a certifying surgeon has given to a workman a certificate that he is suffering from an industrial disease, and is thereby disabled from earning full wages, and that his disablement commenced on a certain date, and the medical referee has allowed an appeal by the employer, his decision is final, and the certifying surgeon cannot validly give a second certificate reasserting the same date of disablement.

Form 15 of the Schedule to the Secretary of State's Regulations observed upon.

Chuter v. *J. J. Ford & Sons* [1915] 2 K. B. 113, followed.

APPEAL from a decision of the judge of Stoke-on-Trent County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

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The applicant was a miner in the employ of the respondents. On June 10, 1918, the certifying surgeon gave to the applicant a certificate that he was suffering from miner's nystagmus, a scheduled disease under the Act, and was thereby disabled from earning full wages at his work, and that the disablement commenced on March 25, 1918. The employers applied for a reference to the medical referee, who, on July 13, 1918, allowed their appeal against the certificate of disablement, following Form 15 of the Secretary of State's regulations under the Act, without any modification. On January 21, 1919, the same certifying surgeon gave another certificate again certifying that the applicant was suffering from nystagmus, and that his disablement commenced on March 25, 1918. The employers did not again appeal to the medical referee, and on May 21, 1919, the workman applied for arbitration. The employers contended before the county court judge that the second certificate was invalid inasmuch as it reasserted a fact—namely, disablement by the disease on March 25, 1918, which was finally negatived by the decision of the medical referee. The county court judge accepted this contention, and dismissed the application for arbitration.

The workman appealed.

The facts and the material provisions of the Act and Regulations are fully stated in the written judgment of Warrington L.J.

Disturnal K.C. and *Whitfield* for the appellant. The second certificate is valid. It was open to the respondents to appeal against it both as to the existence of the disease and as to the date of the disablement, or merely as to the commencement of the disablement. Their remedy was to appeal again to the medical referee. It is said that, having given one certificate, the certifying surgeon was functus officio, but the Act would lead to great confusion if that were right. The second certificate forms the basis of the proceedings for arbitration. It cannot be that the whole matter is concluded for all time by the decision of the medical referee. His decision has only to deal with the particular certificate before him. The finality is that the applicant is debarred from proceeding upon the particular certificate with which the medical referee has disagreed. Having rejected it it cannot become the basis of proceedings under the Act. But that does not preclude the giving of a fresh certificate. The second certificate is not, as to essentials, identical with the first.

[They referred to *Chuter* v. *J. J. Ford & Sons* (1) and *Chippendale* v. *High Explosives, Ld.* (2).]

Shakespeare and *Cave* for the respondents. The question is, what has the medical referee decided? When that is known, it is clear what is finally concluded under s. 8 (1.) (*f*). He has decided something which was essential to the certificate if it was to be the basis of a claim for compensation. The fixing of a particular date as the commencement of the disablement, which is equivalent to the happening of the accident, is essential. The Act treats the existence of the disease as an accident, and the whole machinery of the Act applies equally to the one case as to the other. The essentials of the certificate are, the existence of the disease, the disablement, and the date of the commencement of that disablement. The certificate of June 10, 1918, states that the applicant was suffering from the disease, that he was thereby disabled from earning full wages, and that the disablement commenced on March 25, 1918. The medical referee simply allowed the appeal. He must have decided, therefore, either that the man had not the disease on March 25, or, if he had, that he was not thereby disabled on that date. As to those matters his decision was final: *Chuter* v. *J. J. Ford & Sons.* (3) The decision of the medical referee is therefore conclusive as to some of the matters which are set forth in the later certificate.

[WARRINGTON L.J. Does the statement in the second certificate as to the date of the commencement of the disablement invalidate it altogether?]

The certificate cannot be split up. The Court must deal with it as it is. When the certifying surgeon has certified something which, as in this case, he was precluded from certifying the Court cannot rectify that and so make for him a new certificate which will be valid.

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(1) [1915] 2 K. B. 113.

(2) (1918) 11 B. W. C. C. 221.

(3) [1915] 2 K. B. 113, 120.

In s. 8 (4.), which provides that where the certifying surgeon is "unable" to certify the date on which the disablement commenced, that date shall be the date of the certificate, "unable" means unable from a medical point of view, and not unable owing to a previous certificate of his having been overruled by the medical referee. There are reasons why the certificate must be treated as it stands: (1.) The party on whom it is served relies upon the certificate as given. The compensation is claimed as from the date of disablement. (2.) Assume that the first certificate is overruled and another is given in the form in which it is suggested it ought to be given, then the employer could appeal; but as it is the employer has no opportunity of appealing to the medical referee because he is simply served with the old certificate. It cannot be treated as something which it is not. An applicant whose certificate has been overruled cannot go to the certifying surgeon and get another in the same terms. If he can, how many times is it suggested that he can do so, and compel the employer to appeal to the medical referee?

Disturnal K.C. in reply. As to the giving of a fresh certificate that point is concluded by *Chippendale* v. *High Explosives, Ld.* (1) The appellant is not precluded from having his case reconsidered on fresh materials. Assuming that the certifying surgeon, when giving his second certificate, could not again fix the same date as the commencement of the disablement he should be treated as being "unable" to fix the date under s. 8 (4.), and the date would be the date on which the certificate was given. On that footing the second certificate would be valid.

Shakespeare. The point was not taken below and cannot be taken in this Court: *Payne* v. *Clifton* (2); *Smith* v. *Baker & Sons* (3); *Stevens* v. *Thorne & Co.* (4)

Disturnal K.C. The analogy of *Smith* v. *Baker & Sons* (3) to this case is entirely false.

Cur. adv. vult.

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(1) 11 B. W. C. C. 221.
(2) (1910) 3 B. W. C. C. 439.
(3) [1891] A. C. 325, 333.
(4) [1916] 2 K. B. 69.

Nov. 10. WARRINGTON L.J. The question in this case is whether the county court judge was right in refusing to accept a certificate of a certifying surgeon as a valid certificate under s. 8 of the Workmen's Compensation Act, 1906.

The material provisions of that section are as follows: The first clause of sub-s. 1 of s. 8 is: "(1.) Where (i.) the certifying surgeon appointed under the Factory and Workshop Act, 1901, for the district in which a workman is employed certifies that the workman is suffering from a disease mentioned in the Third Schedule to this Act and is thereby disabled from earning full wages at the work at which he was employed . . . . and the disease is due to the nature of any employment in which the workman was employed at any time within the twelve months previous to the date of the disablement or suspension"—that refers to another matter—"whether under one or more employers, he or his dependents shall be entitled to compensation under this Act as if the disease or such suspension as aforesaid were a personal injury by accident arising out of and in the course of that employment, subject to the following modifications:—(*a*) The disablement or suspension shall be treated as the happening of the accident. . . . . (*c*) The compensation shall be recoverable from the employer who last employed the workman during the said twelve months in the employment to the nature of which the disease was due." Then sub-clause (*f*) of sub-s. 1 of s. 8 says: "If an employer or a workman is aggrieved by the action of a certifying or other surgeon in giving or refusing to give a certificate of disablement or in suspending or refusing to suspend a workman for the purposes of this section, the matter shall in accordance with regulations made by the Secretary of State be referred to a medical referee, whose decision shall be final." Then sub-s. 2 reads: "If the workman at or immediately before the date of the disablement or suspension was employed in any process mentioned in the second column of the Third Schedule to this Act, and the disease contracted is the disease in the first column of that Schedule set opposite the description of the process, the disease, except where the certifying surgeon certifies that in his opinion the disease was not due to the nature of the employment, shall be deemed to have been due to the nature of that employment, unless the employer proves the contrary. . . . . (4.) For the purposes of this section the date of disablement shall be such date as the certifying surgeon certifies as the date on which the disablement commenced, or, if he is unable to certify such a date, the date on which the certificate is given: Provided that (*a*) where the medical referee allows an appeal against a refusal by a certifying surgeon to give a certificate of disablement, the date of disablement shall be such date as the medical referee may determine. . . . . (6.) The Secretary of State may make orders for extending the provisions of this section to other diseases and other processes, and to injuries due to the nature of any employment specified in the order not being injuries by accident, either without modification or subject to such modifications as may be contained in the order."

Miners' nystagmus was not included in the Third Schedule as it originally stood, but has since been included by virtue of an order of the Secretary of State.

Pursuant to the Act, regulations as to the duties of certifying surgeons and as to medical referees were duly made by the Secretary of State and the Treasury. Of these, the following are material: Regulation 3. "After personally examining the workman, the certifying surgeon shall either give the workman a certificate of disablement or shall certify that he is not satisfied that the workman is entitled to such certificate, and shall in either case deliver his certificate to the workman. The certificate given shall be in the form prescribed in the schedule to these regulations." Regulation 8 says: "Where an employer or workman is aggrieved by the action of a certifying or appointed surgeon in giving or refusing to give a certificate of disablement or in suspending or refusing to suspend a workman, he may (*a*) if he is an employer, within seven days of the receipt of the notice of disablement or suspension required to be given under the Act, or, in a case of disablement, if the notice is not accompanied by the certificate of the surgeon, or a copy thereof, and the employer forthwith requires the workman to furnish him with a copy, within seven days of the receipt of such copy." Then provisions are made for the application to the Registrar and for the reference to the referee, and the next regulations that are material are 14, 15, and 16. No. 14 says: "The medical referee shall, on receipt of an order of reference duly signed, by the registrar of a county court, together with copies of the documents required to be sent therewith, fix a time and place for a personal examination of the workman, and shall send notice to the employer and workman accordingly. It shall be the duty of the workman, and, if the employer is the applicant, of the employer or a person duly authorised by him, to attend at the time and place fixed by the medical referee, and in the event of failure on the part of the workman or employer or both to appear as required by this regulation, the medical referee shall decide on the matter referred to him forthwith upon such information as shall be available and with or without a personal examination." Then there is a proviso which is immaterial. No. 15 reads: "Except as otherwise provided by regulation 14, the medical referee shall, before deciding on the matter referred to him, make a personal examination of the workman, and shall consider any statements made or submitted by either party." No. 16 reads: "The medical referee shall, in the form prescribed in the schedule to these regulations (subject to such additions and modifications as the circumstances of the case may require), notify in writing his decision to the registrar of the county court, to the applicant and to the respondent." Form 8 is in these terms: "I, the . . . . surgeon for . . . . hereby certify that . . . . having applied to me to be suspended from his usual employment in pursuance of . . . . made under the Factory and Workshops Act, 1901, on account of . . . . having contracted . . . . being a disease to which the Workman's Compensation Act applies, I have after personally examining the said . . . . refused to suspend . . . ." Form 15 is in these terms: "I hereby give you notice that having duly inquired into the above-mentioned matter in accordance with the regulations of the Secretary of State, I decide as follows," and then in the case material: "I dismiss (or allow) the appeal of (name of employer) against the certificate of disablement given to (name of workman) on the .... day of ...."

It appears therefore that the materials on which the medical referee is to decide are not those on which the surgeon gave his certificate. In this respect his function differs from that of an ordinary appellate tribunal, which, as a general rule, decides an appeal on the materials which were before the Court from which the appeal is brought.

It follows, in my opinion, that the matter referred to the medical referee is the truth or otherwise, at the date of his decision, of the statements made by the certificate, and not merely whether the certificate itself was wrongly given.

The workman in the present case was a miner in the employment of the respondents. On June 10, 1918, Mr. Richmond, as certifying surgeon, gave to the workman a certificate in the following terms: "I, as certifying surgeon appointed under the Factory and Workshop Act, 1901, for the district of Tunstall, Stoke-on-Trent, hereby certify that having personally examined George Frost on the 10th day of June, 1918, I am satisfied that he is suffering from nystagmus, being one of the diseases to which the Workmen's Compensation Act applies, and is thereby disabled from earning full wages at the work at which he has been employed; and I certify that the disablement commenced on the 25th day of March, 1918." Due notice of this certificate and of the workman's claim was, on June 11, 1918, given to the employers.

Being aggrieved by the action of the surgeon in giving the certificate, the employers applied for a reference to the medical referee. The application is in the following terms: Para. 2: "That the said notice was consequent on the certificate of disablement given on the 10th day of June in pursuance of the said Act and Regulations by Mr. J. Watson Richmond, residing at"—so and so—"the certifying surgeon under the Factory and Workshop Act, 1901, for the district of Tunstall, Stoke-on-Trent. (3.) That the applicants are aggrieved by the action of the above-mentioned Mr. J. Watson Richmond in giving the said certificate and claim that the said George Frost had not contracted the disease in respect of which. . . ."

and they mention circumstances which I need not read. Dr. John Wharton, M.D., was then duly nominated as medical referee, and on July 13, 1918, after receiving a written statement on the employers' behalf, and, as I understand, after personally examining the workman, gave the following decision: "I hereby give you notice that having duly inquired into the above-mentioned matter in accordance with the regulations of the Secretary of State, I decide as follows: I allow the appeal of the Clanway Colliery Company, Ld., Clanway Colliery, Tunstall, against the certificate of disablement given to George Frost on the 10th June, 1918"; that is, he follows the form No. 15 without any modification. On January 21, 1919, the same certifying surgeon who gave the former certificate gave another certificate in the following terms: "I, as certifying surgeon appointed under the Factory and Workshop Act, 1901, for the district of Tunstall, hereby certify that having personally examined George Frost on the 21st day of January, 1919, I am satisfied that he is suffering from nystagmus (miners'), being one of the diseases to which the Workmen's Compensation Act applies, and is thereby disabled from earning full wages at the work at which he has been employed; and I certify that the disablement commenced on the 25th day of March, 1918." The employers took no steps to have the matter of this certificate referred to a medical referee, and on May 21, 1919, the workman made his application for arbitration.

The employers contended that the new certificate was invalid inasmuch as it reasserted a fact—namely, disablement by the disease in question commencing on March 25, 1918, which was finally negatived by the medical referee's decision. The county court judge accepted this contention and dismissed the application for arbitration. The workman appeals.

In my opinion, the judgment of the county court judge was correct. The questions before the medical referee were these: (1.) Was the man suffering from the disease? (2.) Was he thereby disabled from earning his full wages? (3.) Did this disablement commence on March 25, 1918? In allowing the appeal, he clearly answers the third of these questions in the negative, for such an answer to either of the other two also answers the third.

For the reason I have already given, I think one of the matters upon which his decision is to be final was the truth or falsehood of the statement as to the commencement of the disablement, and in my opinion the certifying surgeon cannot effectually reassert a statement the truth of which has been finally negatived, and his second certificate was rightly rejected.

But it was contended before us that the other statements in the certificate, dated, as it was, six months after the referee's decision, were not inconsistent with it, that owing to the decision of the referee and the provision in sub-s. 4 of s. 8 the surgeon was in law "unable to certify the date of the commencement of the disablement," and should have simply struck out the words referring to it from the form, in which case the certificate would not have been open to objection, and further that the Court might and ought simply to ignore the incompetent statement. The effect of doing so would be of extreme importance, for it would be to substitute a different "accident" for that relied upon by the workman and materially to alter the relative position of the parties. This point was not taken before the county court judge, and I am bound to hold, following decisions in this Court, that it cannot be taken in this Court. I therefore express no opinion upon it.

I would add this. Form No. 15 has more than once been adversely criticised in this Court on the score of its vagueness, and I cannot but express a hope that it may be considered by the authorities concerned and some form adopted which would express in clear terms the matters actually decided by the referee.

The appeal must be dismissed with costs.

ATKIN L.J. In my opinion this appeal fails upon the ground that it was essential to the workman's application to establish the date of disablement; and that the only date which he averred in his request for arbitration and sought to prove by the certificate of January 21, 1919, was one which it was not competent for him to prove by reason of the final decision of the medical referee expressed in his decision of July 13, 1918.

The form of that decision is not satisfactory. In these cases an appeal from a certificate of the certifying surgeon in favour of the workman may involve three questions: (1.) Whether the workman is suffering from a scheduled disease, (2.) whether he is thereby disabled from earning full wages at the work at which he was employed, and (3.) the date at which the disablement commenced, if so certified. The decision should deal with each of these matters if they have been all referred to the medical referee. The limits of the reference are determined by the form of the application, forms 9 and 10.

In this case the appeal was on the grounds that the certificate was wrong in respect of the first question mentioned above, or alternatively in respect of the second question. Either ground would be sufficient to make the certificate inoperative. By merely allowing the appeal, the referee leaves it uncertain whether he came to the conclusion that the workman was not suffering from the disease, or merely was not disabled. In either case, he necessarily negatives the date as the date of disablement.

I reserve consideration of whether such an award may not be bad for uncertainty. The point was not taken below or before us. On the footing that it was valid, it appears to me that giving it the least possible operation, it must at any rate be taken to decide that the date of disablement from a scheduled disease was not March 25, 1918.

If this is so the decision on this point is final. It was argued before us that this meant only final as regards the validity of that particular certificate, so as to prevent the workman from relying on it in claiming compensation. I do not think that such a view is open to us after the decision in *Chuter* v. *J. J. Ford & Sons.* (1) Now the only proof of date of disablement permitted by the Act appears to be the certificate

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(1) [1915] 2 K. B. 113.

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(Workmen's Compensation Act, s. 8 (4.)), and must be either the date certified as the date on which the disablement commenced, or, if the certifying surgeon is unable to certify such a date, the date on which the certificate was given.

Here the workman has claimed in his application for arbitration that the date of disablement was the date certified to be the date. That date he was precluded from setting up because on July 13, 1918, the medical referee had finally decided it was wrong. So far then, the application failed. It was argued before us that accepting this view, the true result was that the certifying surgeon was unable to certify the date of disablement, and that therefore, under this subsection, the date of the second certificate was the date of disablement. This point was never taken before the learned county court judge, and no amendment such as was necessary to give effect to it was asked for. I am therefore reluctantly driven to the conclusion that it is not open to us to consider the point, accepting, as I do, as binding upon me the decisions of this Court that in Workmen's Compensation Act cases there can be no appeal on a point of law not taken before the arbitrator. I agree that the appeal must be dismissed.

Eve J. We are precluded by authority from determining this appeal on any grounds open to the applicant in the Court below but not taken or argued there. The result is that the sole question we have to determine is whether the certificate of disablement obtained by the applicant on January 21, 1919, was a valid certificate under the Act or whether it was rightly rejected by the learned county court judge.

The two certificates of June 10, 1918, and January 21, 1919, certified that on their respective dates the workman was suffering from miner's nystagmus, and since March 25, 1918, had been thereby disabled from earning full wages at the work at which he was employed. They were identical, therefore, in so far as they fixed March 25, 1918, as the date of disablement under s. 8 of the Act, and the question whether the decision of the medical referee allowing the appeal of the employers against the former certificate finally disposed of

March 25 as the date of disablement turns upon the construction of para. (*f*) of cl. iii. of sub-s. 1 of s. 8 of the Act.

On behalf of the workman it has been contended that the word " action " is to be read as equivalent to " act " and that the matter referred to the medical referee under the clause is simply the question whether or not the act of the certifying surgeon in giving or refusing a certificate is right and that the allowance by the medical referee of an appeal against the giving of a certificate does not involve this consequence that the certifying surgeon cannot thereafter and on a further examination of the workman give a subsequent certificate in identical terms so far as it fixes the date of disablement.

The respondents on the other hand urge that the matter on which the decision of the medical referee is to be final is the whole subject-matter of the certificate, and that in cases where it has once been established—as undoubtedly it has been here—that the medical referee has determined that the date of disablement certified by the surgeon is not the true date, it is not open to the surgeon to reinsert that date in any subsequent certificate.

I think there is much to be said for both contentions, and the acceptance of either brings about results which are hardly satisfactory. While the narrower construction would do away largely with the protection intended to be afforded to workmen and employers alike by the introduction of the appeal to the medical referee and with the advantages of the statutory finality given to his decision, the wider one places the certifying surgeon in a position of great difficulty when applied to at some date after the decision of the medical referee—and possibly in the case of a progressive disease—for another certificate and when he is still of opinion that the true date of disablement is the date fixed by his former certificate. Is he, in such circumstances, to certify a date which he honestly believes to be inaccurate or is he to leave the date uncertified and thereby postpone the workman's initial right to compensation to a date subsequent to that on which he is satisfied that the right to compensation really accrued ? But for what was said by this Court in the case to which Atkin L.J. has just referred (*Chuter* v. *J. J. Ford & Sons* (1)), I cannot help thinking that the question whether on the whole the narrower construction of the clause would not have been more in accord with the general purport of the Act was worthy of careful consideration, but in view of that decision I think we are bound to affix to the clause the wider construction contended for by the respondents, and accordingly I agree that this appeal fails and must be dismissed on the ground that the certificate was invalid by reason of the date of disablement thereby fixed being a date already decided by the medical referee to be inaccurate.

Appeal dismissed.

Solicitors for appellant: *Durnford & Son, for H. W. Adams, Tunstall.*

Solicitor for respondents: *F. J. Berryman, for J. H. Duffell, Birmingham.*

G. A. S.

1919
Dec. 12.

POSTMASTER-GENERAL *v.* BLACKPOOL AND FLEETWOOD TRAMROAD COMPANY.

Electric Tramway—Escape of Electricity—Injury to Telegraph Lines of Postmaster-General—Provisions for his Protection in special Act of Tramway Company—Construction of—Jurisdiction of County Court—Blackpool and Fleetwood Tramroad Act, 1896 (59 *&* 60 *Vict. c. cxlvii.*), *s.* 65, *sub-ss.* (1.), (2.) *and* (6.); *s.* 81.

By s. 65, sub-s. (1.), of the Blackpool and Fleetwood Tramroad Act, 1896, it is provided that in the event of the company's tramroad being worked by electricity the company shall work their undertaking "with due regard" to the telegraphic lines of the Postmaster-General, and "shall use every reasonable means" in the working of their undertaking to prevent injurious affection of such lines.

By sub-s. (2.): "If any telegraphic line of the Postmaster-General is injuriously affected . . . . by the working of the undertaking of the company, the company shall pay the expense of all such alterations in the telegraphic lines of the Postmaster-General as may be necessary to remedy such injurious affection."

In 1898 the defendants under the powers conferred by the said Act

(1) [1915] 2 K. B. 113.

constructed an electric tramway along certain public roads. In 1914 the Postmaster-General laid underground along the same roads a telephone cable, which at one point came within seven feet of the defendants' tramlines. In 1916 a breakdown occurred in the said cable in consequence of its being injuriously affected by an escape of electricity from the defendants' lines. In an action by the Postmaster-General under s. 65, sub-s. (2.), to recover the expense that he had been put to thereby:—

Held, that the liability of the defendants, under that sub-section, which is to be read independently of sub-s. 1, was an absolute liability, and that neither the fact that the defendants had used every reasonable means in the working of their undertaking to prevent injurious affection of the plaintiff's cable, nor that the plaintiff, by laying his cable so near to the defendants' lines had courted the injury, afforded any defence.

By s. 81 of the said Act: "In all cases wherein damages or charges are by this Act directed or authorised to be paid and the manner of ascertaining the amount thereof is not specified or provided for such amount in case of non-payment thereof or any dispute respecting the same shall be ascertained and determined by a Court of summary jurisdiction."

Held, that the "expense of alterations" which the Postmaster-General is entitled to recover under s. 65, sub-s. (2.), is not "damages" within the meaning of s. 81, and that in proceedings for the recovery of such expenses the latter section does not oust the jurisdiction of the county court.

Appeal from the Blackpool County Court.

In 1898 the defendants under the powers conferred by the Blackpool and Fleetwood Tramroad Act, 1896 (59 & 60 Vict. c. cxlvii.), constructed an electric tramway between Blackpool and Fleetwood. The tramway ran in part of its course on public roads, and in other parts alongside the public roads, just outside the boundary fence and on private land specially acquired for the purpose. In 1914 the plaintiff, the Postmaster-General, caused to be laid underground in the roadway along the same road as that followed by the defendant's tramway a cable containing telephone wires. At one point the cable was laid within seven feet of the defendants' electric lines. In June, 1916, a breakdown of the plaintiff's cable and an interruption of telephonic communication occurred in consequence of the lead piping of the cable being injuriously affected by electrolytic corrosion due to escape of electric current from the defendants' lines. The plaintiff was thereby put to expense in altering his cable, and to recover the amount of that expense, 16*l.* 18*s.*, he brought this action in the county court. By s. 66 of the defendants' special Act above mentioned they were authorized to use electric power for the working of their tramway only subject to the condition of their complying with certain regulations of the Board of Trade, but the county court judge found that those regulations had been complied with. By s. 65 of the said Act provision was made for the protection of the plaintiff: "In the event of the tramroad or tramway of the company being worked by electricity the following provisions shall have effect":—

Sub-s.(1.): "The company shall construct their electric lines and other works of all descriptions and shall work their undertaking in all respects with due regard to the telegraphic lines from time to time used or intended to be used by Her Majesty's Postmaster-General and the currents in such telegraphic lines, and shall use every reasonable means in the construction of their electric lines and other works of all descriptions and the working of their undertaking to prevent injurious affection whether by induction or otherwise to such telegraphic lines or the currents therein." By sub-s. (2.) of that section: "If any telegraphic line of the Postmaster-General is injuriously affected by the construction by the company of their electric lines and works or by the working of the undertaking of the company the company shall pay the expense of all such alterations in the telegraphic lines of the Postmaster-General as may be necessary to remedy such injurious affection." And by sub-s. (6.): "For the purposes of this section a telegraphic line of the Postmaster-General shall be deemed to be injuriously affected by an act or work if telegraphic communication by means of such line is, whether through induction or otherwise, in any manner affected by such act or work or by any use made of such work." The defendants, as the county court judge found, had used all reasonable means in the construction of their electric line and the working of their undertaking to prevent injurious affection of the plaintiff's cable, and particularly had made monthly tests for the purpose of detecting excessive leakage of electric current and those tests showed satisfactory results. Subsequently to the breakdown of the plaintiff's cable the plaintiff, at the defendants' invitation, bonded his cable to their track, whereupon further electrolytic corrosion practically ceased. The action was framed under s. 65, sub-s. (2.)

At the hearing in the county court a question was raised as to whether the jurisdiction of that Court was not ousted by s. 81 of the defendants' special Act which provides that "In all cases wherein damages or charges are by this Act directed or authorised to be paid and the manner of ascertaining the amount thereof is not specified or provided for such amount in case of non-payment thereof or any dispute respecting the same shall be ascertained and determined by a Court of summary jurisdiction." The defendants, however, did not press the objection, and the judge proceeded to hear the case. He held that sub-s. (2.) of s. 65 must be read along with sub-s. (1.), and that in the absence of proof that the defendants had failed to take all reasonable means to prevent the injury the plaintiff could not succeed. He accordingly gave judgment for the defendants.

The plaintiff appealed.

Ross Brown and *Branson* (*Sir Gordon Hewart A.-G.* with them) for the plaintiff.

Rigby Swift K.C. for the defendants took a preliminary objection that the county court judge, having no jurisdiction in the matter and hearing the case only by the consent of the parties, was acting as an arbitrator, and that from his decision there was consequently no appeal.

Ross Brown and *Branson* for the plaintiff. The action is not for damages but for a statutory debt, and therefore s. 81 does not apply. Under those circumstances the case falls within the ordinary jurisdiction of the Court under s. 56 of the County Courts Act, 1888.

Rigby Swift K.C. in reply. The "expense of alteration" is not the less "damages" because there is a statutory

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agreement to pay it. Further, the parties having agreed to compromise the question of jurisdiction and to leave the case to the county court judge for decision, it is not now competent for the plaintiff to turn round and claim that the judge had jurisdiction.

WARRINGTON L.J. This is an appeal from an order of the county court judge made in an action in which the postmaster-General was the plaintiff and the Blackpool and Fleetwood Tramroad Co. were the defendants. A Preliminary objection is raised that the county court judge had no jurisdiction to entertain the action and that therefore no appeal lies from his decision. The parties, it is said, consented to his hearing the matter and by so doing treated him as an arbitrator whose decision would be final. Now in general I think it is well settled that if parties agree to a matter being determined by a judge who has no jurisdiction to entertain it as a judge, they thereby constitute him an arbitrator, and do not extend his jurisdiction in the strict sense and make him capable of dealing with the matter as a judge. But the point which we really have to determine is whether the county court judge had jurisdiction. That question turns upon certain sections of the defendants' private Act. Now s. 65 of that Act contains certain provisions for the protection of the Postmaster-General and of his telegraphic lines, and sub-s. (2.) of that section is in these terms: [His Lordship read the sub-section.] On that sub-section the plaintiff relies, he makes it the foundation of his claim. The claim therefore is for a statutory debt. The provision in sub-s. (2.) is not that the company shall be liable in damages for the injury that they do, but that they shall pay the expenses of certain alterations which may be rendered necessary in consequence of the construction or working of their tramroad. For the defendants reliance is placed on s. 81 of the same Act. [He read the section.] In my opinion that section does not refer to the expenses of alterations dealt with in s. 65, sub-s. (2.). The word "charges" in such Acts as this is I think used only in reference to the charges payable for conveying passengers or goods upon the tramways. The word "damages" would of course cover all damages at common law for injury by any form of tort or breach of contract; but it seems to me that it does not include the payment of special expenses recoverable under the Act as a statutory liability. I think therefore that s. 81 does not exclude the jurisdiction of the county court in such a case as this. But then it is said that the parties, on the assumption that there was no jurisdiction, agreed to leave the matter to the county court judge to determine as an arbitrator, and that therefore there is no appeal. That is not, I think, what happened. In my view what happened was that the defendants did not insist upon their objection to the jurisdiction but waived it. I think the county court judge had jurisdiction to determine this question, and therefore that the preliminary objection fails.

SCRUTTON L.J. I agree. Mr. Rigby Swift takes a preliminary objection that the county court judge was acting as an arbitrator in a matter beyond his jurisdiction, and that therefore on ordinary principles no appeal lies. Now the claim made by the plaintiff was based on s. 65, sub-s. (2.), of the defendants' private Act, and was to recover the expenses of such alterations of the plaintiff's lines as might be necessary in consequence of injurious affection by the working of the defendants' undertaking. It was contended for the defendants that such a claim could only be prosecuted before a Court of summary jurisdiction by reason of s. 81 of that Act which provides that "In all cases wherein damages or charges are by this Act authorised to be paid" the amount of such damages or charges and any dispute respecting the same shall be ascertained and determined by a Court of summary jurisdiction." But the "charges" there mentioned relate to the charges of the undertakers and I cannot read the provision in s. 65, sub-s. (2.), that the company shall pay the expenses of alterations therein specified as a provision that they shall pay "damages." A claim under that sub-section appears to be a claim for a statutory debt, and if that is so the county court judge had jurisdiction under s. 56 of the County Courts Act. In my opinion the preliminary objection fails.

Ross Brown for the plaintiff on the merits. The judge was wrong in holding that there was no liability under sub-s. (2.) of s. 65 independently of sub-s. (1.). The injurious affection dealt with in sub-s. (2.) is not an injurious affection resulting from a failure to use all reasonable means to prevent it. The two sub-sections create distinct liabilities. [He was stopped by the Court.]

Rigby Swift K.C. and *Wingate Saul K.C.* for the defendants. It is conceded that the reasons given for the judge's decision were wrong, but the decision itself was right. It is admitted that sub-s. (2.) is entirely independent of sub-s. (1.), but the defendants are not liable under sub-s. (2.), for the telegraphic lines of the plaintiff were injuriously affected, not by the working of the defendants' undertaking, but by his own negligent act. The defendants' electric lines were laid in 1898. The plaintiff's cable was not laid till 1914 and then he laid it within seven feet of the defendants' lines. If the plaintiff had laid down his cable first the defendants would by sub-s. (3.) of s. 65 have been prohibited from laying down any electric line for working their tramway within thirty feet of the plaintiff's cable. That shows clearly that the plaintiff's act in placing his cable so near the defendants' lines was a proceeding which was almost certain to be productive of injury. He was therefore the cause of his own damage. Moreover he omitted to take the simple precaution of bonding his wires to the defendants' lines. The experiment which was subsequently made showed that had he done so the injurious affection complained of would probably have never taken place. It is true that the contributory negligence of the plaintiff cannot be set up as a defence to an action for breach of a statutory duty. But here the defendants' had committed no breach of any statutory duty. The judge found that they had worked their undertaking with due regard to the telegraphic lines of the plaintiff, and had complied with the regulations of the Board of Trade designed for the prevention of injurious affection.

Ross Brown was not called on to reply.

WARRINGTON L.J. The question which we have to decide arises under these circumstances. Under a private Act of 1896 the defendant company in the year 1898 constructed along a certain highroad a tramway which is worked by electricity. In the year 1914 the Postmaster-General caused to be laid along the same road a cable for telephonic purposes, and at one place the cable so laid came within seven feet of the defendants' tramlines. In the year 1916 there occurred a large leakage of electricity from the defendants' lines, and as a result of that the Postmaster-General's cable was injuriously affected. It became necessary to make certain alterations in the cable in order to repair the damage that had been done and to prevent its recurrence in the future, and this action was brought to recover the expenses thereby incurred. The case turns upon the proper construction of s. 65 of the defendants' private Act and in particular of sub-s. (2.). Sect. 65 is a section inserted for the protection of the Postmaster-General and it provides as follows: [His Lordship read sub-ss. (1.), (2.) and (6.)]. Now it is said on behalf of the Postmaster-General that under sub-s. (2.) he is entitled to recover the expenses therein mentioned if any telegraphic line of his is injuriously affected by the working of the defendants' undertaking no matter how that injurious affection may be brought about. It is admitted that the telephone cable in the present case is within the expression "telegraphic line," and it is found that the cable was injuriously affected by the working of the tramway. It is contended that the Postmaster-General having established those facts is entitled to recover the expense of making the alterations necessary to remedy the injurious affection. On behalf of the defendants it is said that the Postmaster-General is not so entitled if it is shown that what happened was due to negligence on his part, and it is said that he was guilty of negligence in bringing his telephone cable within such a short distance as seven feet of the defendants' line. In my opinion the negligence of the Postmaster has nothing to do with the question. Sub-s. (2.) appears to me to give him a statutory right to recover the expense of making the alterations therein referred to if they are rendered necessary by the injurious affection of his telegraphic line by the working of the tramway. If in fact the working of the tramway does so injuriously affect the line it is immaterial to consider how it is that it does so. The county court judge seems to have committed the error of thinking that the injurious affection mentioned in sub-s. (2.) is an injurious affection arising from a failure to comply with the provisions of sub-s. (1.). In my opinion there is no ground for that view. Sub-s. (2.) does not refer in any way to the precautions required by sub-s. (1.), nor is there any reason why it should. The Legislature may well have intended to provide that due precautions should be taken to prevent injurious affection arising, but at the same time to provide that if notwithstanding such precautions it did arise the expense occasioned thereby should be paid by the owners of the tramway. For these reasons I think that the judgment of the county court judge was wrong and that the Postmaster-General is entitled to have judgment entered for him.

SCRUTTON L.J. I agree. The claim of the Postmaster-General was for damage done to a telegraphic cable, which ran under a highroad, by the leakage of electricity from a tramway line belonging to the defendant company. The claim was made under s. 65, sub-s. (2.), of the defendants' private Act, the plaintiff asserting that his cable was injuriously affected and asking for the expense of the alterations necessary to repair the injury. The county court judge decided in favour of the defendants on the ground that there must be read into sub-s. (2.) the provisions of sub-s. (1.), which require that the company shall construct their electric lines and work their undertaking with due regard to the telegraphic lines of the Postmaster-General, and shall use all reasonable means to prevent those telegraphic lines from being injuriously affected. He thought it was essential to a claim by the Postmaster-General under sub-s. (2.) that he should show that the injurious affection was caused by the negligence of the company. Mr. Rigby Swift felt himself unable to support the reasons of the county court judge for coming to his conclusion, and I think rightly, for I can see no reason for reading into the plain words of sub-s. (2.) an implication from the language of sub-s. (1.). But he says that though he cannot support the county court judge's reasons he thinks his conclusion was correct, upon the ground that the injurious affection of the plaintiff's cable was caused not by the working of the defendants' tramway but by the negligence of the Postmaster-General himself. It must be remembered what the position was before the private Act was passed. There was a public road, over the whole of which the Postmaster-General had power to place telegraphic lines, subject to the provisions of the Telegraph Acts that when he decided to place such lines in a public road he must settle the position and course of those lines with the local authorities who have the control of the road and the sewage. If he differed from them proceedings were to be taken to determine which was right, but if he did not differ from them he had power to place his lines in any part of the road that he selected. The Postmaster-General having those powers, the defendant company asked for parliamentary authority to put a tramway along the road in a way which must interfere with the rights of the Postmaster-General, and thereupon the Postmaster-General, as is usual in cases of this kind, when the private bill was before Parliament obtained the insertion of a clause for his protection; and one of the provisions of that clause was that if any telegraphic line belonging to him should be injuriously affected by the working of the company's undertaking the company should pay the expense of such alterations as might be necessary to remedy the injurious affection. That is to say, the Postmaster-General having the right to put down lines in any part of this road, the company could only be allowed

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to bring their undertaking into the road subject to that right, and upon the terms that if the electricity from their tramlines should injure any wires of the Postmaster-General lawfully in the road they should pay for the damage. We must assume that this cable of the Postmaster-General was in the road with the consent of the local authorities. If so it is a wire lawfully in the road which has been injured by the working of the company's undertaking, and under those circumstances the company must pay. Mr. Rigby Swift asks what would happen if the Postmaster-General were to lay down his cable on the top of a live wire of the defendants'. It is difficult to suppose that the Postmaster-General would think of doing such a thing or that if he did the local authority would consent to his doing it, but if they did consent and if he accordingly laid down his cable in such a perilous position he would none the less be lawfully in the road and would, I think, be entitled to the protection of s. 65, sub-s. (2.). There must be judgment for the appellant.

Appeal allowed.

Solicitor for the appellant: *Solicitor to the Post Office.*
Solicitor for the respondents: *J. R. Gaulter, Fleetwood.*

J. F. C.

[IN THE COURT OF APPEAL.]

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Nov. 7.

[1919. W. 451.]

Insurance, Marine—Time Policy on Houseboat at Anchor—" Liberty to shift "—" Including all risk of docking "—Houseboat being towed to Dock—Loss through Peril of Sea.—Abandonment of insured Adventure.

A time policy of marine insurance on the plaintiff's houseboat " whilst anchored in a creek off Netley, however employed. With liberty to shift," against the usual perils, contained a clause: " Including all risk of docking, undocking, changing docks and going on gridiron or graving docks as may be required during the currency of this policy." The vessel was at the time anchored in the river Hamble, Southampton Water, which, it was agreed, came within the words " in a creek off Netley." During the currency of the policy the plaintiff desired to have the houseboat cleaned and her underworks examined for repairs, and he arranged to have her towed by a low-powered tug from the Hamble up Southampton Water to a yard on the river Itchen above Southampton Docks, a distance of about seven miles, and to have her placed on a gridiron there. This yard was the nearest and most convenient yard with a gridiron. Both the river Hamble and the yard were within the port of Southampton. The tug was not available on the day fixed for the towage, and a larger tug was sent, and the houseboat was lashed alongside the tug and thus towed to the yard. On arrival in the Itchen about four feet of water were found to have entered the houseboat, and she continued to make water and sank outside the yard. It was found that some of the side seams above the water line were defective and had opened, and the bow wave made by the tug and tow raised the water to the level of the defective seams, and the water entered and caused the sinking. The plaintiff did not know that the seams were defective. The towage was performed in the manner usual in Southampton Water. At the time when the houseboat left the Hamble the plaintiff did not intend to take her back there during the currency of the policy, but to lay her up in the Itchen. In an action on the policy:—

Held, (1.) that the taking of the houseboat to the yard on the Itchen was authorized by the docking clause in the policy, and that therefore the vessel was covered when the loss occurred; (2.) that the vessel was lost through a peril of the sea; and (3.) that the plaintiff had not at the time of the loss abandoned the insured adventure.

By Bankes L.J. (Scrutton and Atkin L.JJ. not expressing a final opinion): The clause giving " liberty to shift " did not authorize the taking of the vessel to the yard.

APPEAL from the judgment of Bailhache J. at the trial of the action without a jury.

The action was brought to recover for a loss under a policy of marine insurance, underwritten by the defendant, on the plaintiff's houseboat *Dorothy*. The policy, which was a Lloyd's policy, dated August 19, 1918, was for a period of six calendar months commencing July 14, 1918, and ending January 13, 1919, both days inclusive, on the houseboat "whilst anchored in a creek off Netley, however employed. With liberty to shift." The policy was for 400*l.* on hull and materials machinery and boilers valued at 400*l.*, and covered the usual perils, and it contained the following clauses: "Including all risk of docking, undocking, changing docks and going on gridiron or graving docks as may be required during the currency of this policy." "In the event of any deviation or change of voyage, it is hereby agreed to hold the assured covered at a premium to be arranged." The policy was a renewal of a similar policy for six months, when the *Dorothy* was let in January, 1918, to the Admiralty for the purpose of housing workmen employed by a firm of contractors, who were engaged in raising a wreck off Calshot· She was then anchored in the river Hamble. In June, 1918, the plaintiff gave notice to terminate the hiring, and the hiring was terminated early in September. The plaintiff had purchased the *Dorothy* as a place of residence for himself, his wife and family, and they resided on board except during the time when she was occupied by the contractors' men. During the winter months in each year before 1918 the *Dorothy* was laid up in the river Itchen above Southampton Docks, the plaintiff and his family continuing to reside in her. When the contractors' workmen left her in September, 1918, she was in such a condition that the plaintiff determined to have her taken to Camper & Nicholson's yard on the Itchen above Southampton Docks, to have her placed on the gridiron there, and to have her cleaned, painted and redecorated for himself and family to reside in, and to have her hull examined. He also intended when those operations were concluded to lay her up in the Itchen for the winter. Camper & Nicholson's yard was the nearest and most convenient yard with a gridiron. The plaintiff accordingly arranged that she should be towed

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from the river Hamble to the yard by a small tug called the *Test*, and he arranged to have three men on board the *Test* to assist in the towage operations. The machinery of the *Test* broke down and she was not available for the towage, and the deputy dockmaster sent a larger and more powerful tug, called the *Dorrington*, to tow the *Dorothy* to the yard. The *Dorrington* went to the river Hamble on September 21, but the master found no one in charge of the *Dorothy*, the men sent to the *Test* being prevented from going down by the breakdown of the machinery. After waiting a little time he put two men and a boy on board the *Dorothy* and lashed her alongside the *Dorrington*. She was lashed alongside in the ordinary way, with fenders to keep her off the *Dorrington*, and made fast ahead and astern. In this way she was towed by the *Dorrington* at a speed of about five or six knots from the river Hamble, up Southampton Water, to Camper & Nicholson's yard, a distance of about seven miles. On arrival outside the yard it was found that about four feet of water had entered the *Dorothy* during the course of the towage, and she made further water until she sank. The *Dorothy* was subsequently raised and repaired, and this action was brought on the policy to recover the amount of the expenses so incurred. It was admitted that both the river Hamble and Camper & Nicholson's yard were within the port of Southampton.

The learned judge found that the water got into the *Dorothy* during the course of the towage through an opening in some of the topside seams above the ordinary waterline, the bow wave from the *Dorrington*, combined with the bow wave from the *Dorothy*, raising the level of the water and causing the water to reach the leaky and defective seams and to enter the *Dorothy*, and thereby causing her ultimately to sink. He also found that the way in which the towage was performed was the ordinary way in which towage operations were performed in Southampton Water.

The learned judge held that the moving of the *Dorothy* from her anchorage in the river Hamble (which, it was agreed, came within the words " a creek off Netley " to Camper &

Nicholson's yard, in the circumstances of the case, came within the words of the policy "with liberty to shift," and that the plaintiff had not abandoned the insured adventure; but he thought that the words giving the right to dock would not of themselves, apart from the words giving "liberty to shift," have kept her within the policy. He also came to the conclusion on the question of unseaworthiness, of which it was not suggested that the plaintiff was aware, that the loss was not one which must have happened from the unseaworthiness in any event, but was the joint result of unseaworthiness and a supervening peril, and that, as there was no warranty of seaworthiness in a time policy, the plaintiff was entitled to recover. He accordingly gave judgment for the plaintiff for the amount claimed.

The defendant appealed.

R. A. Wright K.C. and *E. A. Digby* (*Simey* with them) for the defendant. The learned judge was wrong in holding that the policy was still in force when the loss occurred. The period of the risk was for six months while the vessel was anchored in a creek off Netley with liberty to shift. When the loss occurred the vessel was not in a creek off Netley. The plaintiff was leaving the river Hamble with no intention of taking the *Dorothy* back within the period for which the vessel was insured. The adventure for which he required insurance had come to an end. An adventure may be limited not only in time and space but also by the object and intention of the assured. He may terminate the adventure by finally departing from the scene of its action, as the plaintiff did in this case. By so doing he put an end to the further liability of the defendant. The risk was at an end when he weighed anchor on his voyage to Camper & Nicholson's yard intending to lay the *Dorothy* up in the Itchen for the winter. The learned judge was unduly influenced by the words "with liberty to shift." They can only apply to a shifting in the course or for the purposes of the adventure. They do not include a shifting after the adventure is ended.

Next, if there was no abandonment of the insured adventure, the learned judge was wrong in holding that the "liberty to shift" covered the taking of the *Dorothy* to Camper & Nicholson's yard. Those words must be read as meaning a shifting incidental to the adventure insured, namely, a vessel at anchor in the river Hamble. Any shifting incidental to that adventure, e.g., a shifting to another anchorage within the sheltered waters of the Hamble—that is, within the area of the insured adventure—would be covered by the policy. Towing the *Dorothy* in the more exposed sea in Southampton Water to a yard on the Itchen about seven miles from the Hamble, not intending to bring her back, did not come within the clause giving liberty to shift. Nor did it come within the clause "including all risk of docking." That clause also must apply to a docking of a vessel anchored in the Hamble. The docking must be incidental to the risk covered, so as to enable the vessel to lie at anchor in the Hamble, and the liberty to dock must be read in the light of the requirements of the insured adventure, and cannot cover a docking so far away up Southampton Water, especially when it was not intended to bring the *Dorothy* back to the Hamble during the currency of the policy. The learned judge was right upon this point. [*Pearson* v. *Commercial Union Assurance Co.* (1) was referred to.]

Further, there was no peril of the sea. The loss was caused not by the state of the sea, but by the act of towing the *Dorothy* up Southampton Water. The towage, as the learned judge has found, was properly performed in the ordinary way, and the loss was caused by the bow wave of the tug raising the water to the level of the defective seams. The bow wave was inevitably caused in the course of towing. The loss was the natural result of the towage of a vessel in the condition of the *Dorothy*. There was nothing fortuitous or unexpected about it so as to make the loss one by a peril of the sea: The *Xantho* (2); *Ballantyne* v. *Mackinnon* (3); *Sassoon & Co.* v. *Western Assurance Co.* (4); Marine Insurance Act, 1906

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(1) (1876) 1 App. Cas. 498.
(2) (1887) 12 App. Cas. 503, 509.
(3) [1896] 2 Q. B. 455.
(4) [1912] A. C. 561.

(6 Edw. 7, c. 41), Sched. I., Rules for Construction of Policy, r. 7. [*Dudgeon* v. *Pembroke* (1); Marine Insurance Act, 1906, s. 45, were also referred to.]

Leck K.C. and *L. C. Thomas* for the plaintiff (not being required to argue the question of peril of the seas). There was no abandonment of the insured adventure. Even if the plaintiff had the intention when the *Dorothy* left the river Hamble not to bring her back again until after the policy had expired, it was only an intention to deviate, and not to abandon the insured adventure. But even assuming an intention to abandon, until that intention is carried into operation there is no abandonment. The policy was therefore in operation at the time of the loss. No question however of abandonment or deviation arises, because the taking of the *Dorothy* to Camper & Nicholson's yard was within the clause giving liberty to shift and the docking clause. The evidence shows that the yard was the nearest suitable yard to the river Hamble. Those clauses would not cover the taking of the vessel to the open sea, but they do include taking her up the sheltered waters of Southampton Water and docking her at the yard on the Itchen. The policy therefore covered the loss.

Digby in reply.

BANKES L.J. This is an appeal from the judgment of Bailhache J. holding that the loss was covered by the policy. The policy was on a houseboat called the *Dorothy*, and in the policy as well as in the policy which preceded the one in question she was described as "anchored in a creek off Netley." By agreement the vessel was allowed to lie at anchor in the river Hamble, and therefore the description of the vessel in the policy must be taken as "anchored in the river Hamble." She had been let for occupation by some workmen who were engaged in raising a wreck off Calshot Castle, and on the determination of the letting it was necessary to have her examined, and cleaned and decorated for the plaintiff and his family to reside in her. For that purpose she had to be towed

(1) (1877) 2 App. Cas. 284.

to Camper & Nicholson's yard on the Itchen, where there was a gridiron, a distance of about seven miles from her anchorage. The plaintiff arranged for a small tug of low power to be sent with some of his men to assist, but the machinery of this tug broke down, and a high-powered tug was sent without the plaintiff's men. The *Dorothy* was lashed alongside the tug and towed in that way. On the voyage sea-water found its way into the *Dorothy* and in consequence she foundered near the yard, and expenses were incurred in raising and repairing her. This action is brought to recover those expenses. The learned judge found that the seams of the *Dorothy* above the waterline were open, and that the breast wave made jointly by the tug and the *Dorothy* raised the water to the level of the defective seams, and she in consequence sank.

It was said that there was no peril of the sea. The learned judge found that there was, and I agree with him. It seems to me that the unusual height of the breast wave caused by this large tug and the *Dorothy* may properly be called a fortuitous accident or casualty of the sea, and if it caused or contributed to the loss it is immaterial that the vessel was unseaworthy.

The next matter raises a more difficult question. The policy was on the *Dorothy* " whilst anchored in " the river Hamble, " with liberty to shift," and it contained a docking clause : " including all risk of docking, undocking, changing docks and going on gridiron or graving docks as may be required during the currency of this policy." Two points are raised in this connection. It is said first that the taking of the *Dorothy* from the Hamble to the yard on the Itchen was not covered by the shifting clause ; and secondly, that taking her there, considering the distance and that she would have to leave the Hamble and be towed up Southampton Water, could not be covered by the liberty to dock. One must see what are the limits placed upon the adventure by the language of the policy. First, as regards the shifting clause. There is a limitation of time from July 14, 1918, to January 13, 1919, and there is a limitation of space indicated by the words

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"whilst anchored in a creek off Netley"—or, to use the agreed equivalent, "whilst anchored in the river Hamble"—with liberty to shift. How is that area of space extended by the "liberty to shift"? Those words, being used of a vessel at anchor, mean, in my opinion, liberty to shift from one anchorage to another within the limits of the river Hamble. Upon this point I agree with the contention of the defendant, and cannot agree with Bailhache J. But then comes the liberty of docking and going on the gridiron. According to the evidence there was a gridiron at Camper & Nicholson's yard, and it was not suggested that there was a dock or a gridiron in the river Hamble. If therefore the defendant's contention on this point is right, the result is that no meaning can, on the facts of this case, be given to the liberty to dock clause, because, if the area of the adventure is never to exceed the limits of the river Hamble, there is no dock in the Hamble, and none, at any rate none with a gridiron, nearer than Camper & Nicholson's yard. One must therefore either ignore the docking clause, or say that it was within the intention of the parties that the vessel might be taken to this the only available gridiron, and that the parties intended that the insured adventure should cover the vessel proceeding to this particular gridiron. This latter view is, to my mind, the true construction of the policy. Some meaning must be given to the docking clause, and if so this clause covers this case.

It is then said that the plaintiff abandoned the only adventure covered by the policy, because the policy covered the vessel while anchored in the river Hamble, with liberty to proceed to the gridiron and to return to the Hamble; and that when the *Dorothy* left the river Hamble and proceeded to the gridiron, the plaintiff, who did not intend to bring her back, abandoned the adventure from the time when the *Dorothy* left the Hamble. I cannot agree. The plaintiff was entitled to take the vessel to the gridiron, and though he may have intended to remain in the Itchen and not to return to the Hamble after the repairs were completed, that intention was not made manifest until after the completion of the docking, an operation which was covered by the policy.

For these reasons I think that the appeal should be dismissed.

SCRUTTON L.J. I arrive at the same result, and as I am not sure that I do so by the same road as that traversed by the learned judge in the Court below, I will give my reasons in my own words. The plaintiff owned a houseboat called the *Dorothy*, and at the beginning of 1918 she was let to the Admiralty for the purpose of housing some workmen who were employed by a contractor in salving a wreck near Calshot Castle. The plaintiff took out a policy to cover the *Dorothy* against certain risks. What those risks were is not exactly clear. The underwriters were told before the policy was issued that the *Dorothy* was going to lie in a named creek off Netley. They were apparently told before the second policy was issued that she was not lying in that creek, but was lying in the Hamble river, on the same side of Southampton Water as Netley and nearly opposite Calshot Castle, and in each policy they used the words "whilst anchored in a creek off Netley." The policy covers her "however employed," and cannot therefore be limited so as only to apply to her while moored for the purpose of carrying on salvage work near Calshot. The policy contains the words "with liberty to shift." Bailhache J. has taken the view that the words "however employed with liberty to shift" would enable her to shift up Southampton Water to another ordinary mooring place for houseboats or yachts in the river Itchen. I do not at present think that I can put so wide a meaning on the words "liberty to shift." It is not necessary, in my view, to determine it, but at present I should require to give it more consideration before agreeing with the learned judge on that point. These general clauses are usually interpreted and limited with regard to the adventure contemplated by the policy, and I find some difficulty in extracting from this time policy that it is a policy on the *Dorothy* wherever moored in Southampton Water. It is not necessary to express a final opinion on the point; I need only say that I do not at present agree with the learned judge's view upon it.

There is however another clause in the policy, the docking

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clause, to which effect has to be given with reference to the adventure contemplated by the parties, because the general words of the clause must be limited by the adventure contemplated. That clause is in these words: "Including all risk of docking, undocking, changing docks and going on gridiron or graving docks as may be required during the currency of this policy." The *Dorothy* was being towed from the Hamble river up Southampton Water to a gridiron at a yard on the Itchen just above Southampton Docks, and, according to the evidence, was going to be put on the gridiron for the purpose of cleaning her bottom and seeing to the condition of her underworks after she had been lying for some considerable time in the river Hamble or at the mouth of Southampton Water. I will assume that when her docking was finished she would very probably not have returned to the Hamble river, but would have laid up in the upper waters of the Itchen. It is contended that, when once the owner of the *Dorothy* had made up his mind that she was not to come back to the Hamble river, the journey to the dock, even for the purpose of repairing the damage done while she was lying in the Hamble river, cannot be covered by the policy, because from the moment she left the Hamble not intending to return the policy was at an end. That is putting too narrow a construction on the policy. It gives no effect to the docking clause, supposing the assured makes use of that clause towards the end of the adventure within the terms and period of the policy to repair damage done during the insured adventure. Bailhache J. having held the vessel covered under the shifting clause was inclined to think she was not covered under the docking clause. I feel the difficulty about covering her under the shifting clause, but I am quite clear she can be covered under the docking clause. She was going to be put on the gridiron during the currency of the policy because that course was required by what had happened to her while she was lying anchored in a creek off Netley within the meaning of the policy. Therefore on the question whether the risk attached during her towage I come to the same conclusion as the learned judge though for different reasons.

The second point taken is this: It is said that the *Dorothy* was unseaworthy, and that the unseaworthiness alone caused the loss. The policy is a time policy, and therefore under the well-known doctrine now embodied in s. 39, sub-s. 5, of the Marine Insurance Act, 1906, "there is no implied warranty that the ship shall be seaworthy at any stage of the adventure, but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness." It is admitted that there was no privity of the assured in sending the vessel on her towage in an unseaworthy state, because he did not know of it. Therefore the later clause of the section does not apply. But it is said that the loss happened through unseaworthiness alone, and not from a peril of the sea, and the definition of perils of the sea in the Marine Insurance Act, 1906, Sched. I., Rules for Construction of Policy, r. 7, is relied on: "The term 'perils of the seas' refers only to fortuitous accidents or casualties of the seas. It does not include the ordinary action of the winds and waves." When a ship, which is not the subject of a warranty of seaworthiness, is lost at sea, a difficulty often arises, and an explanation has been given of the result by Blackburn J. in *Dudgeon* v. *Pembroke* (1), which is the explanation generally referred to in this connection. There the ship was assumed to be unseaworthy when she went to sea, but the assured did not know of it. She went ashore while she was making for Hull in distress, and the cause of her going ashore was partly because she was full of water and had become unmanageable. Blackburn J. said: "The cause of that cause, viz., her being in distress and full of water, was, that when she laboured in the rolling sea she made water; and the cause of her making water was, that when she left London she was not in so strong and staunch a state as she ought to have been; and this last is said to be the proximate cause of the loss, though since she left London she had crossed the North Sea twice. We think it would have been a misdirection to tell the jury that this was not a loss by perils of the seas, even if so connected with the state of unseaworthiness as that it would prevent any one who knowingly sent her out in that state from recovering indemnity for this loss." The learned judge in the present case assumed that the vessel while she lay at anchor was seaworthy; that her underworks, the part ordinarily under water, were staunch and strong; but he found that she was towed by a more powerful tug than had been expected, being lashed alongside the tug, that an unusual breast wave was made by that towage, and that it affected a part of the vessel not usually affected by water where the seams had opened partly from towage by a too powerful tug, and that the water made its way through those seams, and he found that that state of things came within the law as explained by Blackburn J. It is his finding of fact. There was evidence upon which the learned judge could so find, and I do not feel disposed to dissent from his finding, though he might have made a finding which would have brought the case within the propositions of law stated by the defendant's counsel.

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(1) (1874) L. R. 9 Q. B. 581, 595. The judgment was affirmed in H. L. 2 App. Cas. 284.

For these reasons I agree that the appeal should be dismissed.

ATKIN L.J. I am of the same opinion. I so entirely agree with the judgment of Scrutton L.J. that I do not propose to add anything further upon these points, except a few words on the question upon which we all, I think, differ from the learned judge below, namely, whether the journey to the gridiron came within the docking clause. Upon that I think one derives considerable help from *Pearson* v. *Commercial Union Assurance Co.* (1) In that case there was a time policy for three months against fire effected on a steamship called the *Indian Empire*. The policy described it as then "lying in the Victoria Docks," but gave it "liberty to go into dry dock, and light the boiler fires once or twice during the currency of this policy." What happened was that in order to go into dry dock, the vessel being a paddle steamship, it was necessary to remove the lower half of the paddle-wheels, and this having been done she was then towed to Lungley's Dry Dock two miles up the river. She was then repaired, but instead of being towed back to the Victoria Docks she was moored in the river to have her paddle-wheels replaced. While there she was burnt. It was held by the House of Lords that the visit to the dry dock came within the terms of the policy, but that the mooring in the river for about ten days for the purpose of replacing the paddle-wheels was not within the policy. Lord Cairns L.C. said (1): "The ship is therefore covered by the policy during the three months so long as it is lying in the Victoria Docks, and so long as it is in a dry dock, or at all events in a dry dock in the port of London." And later on (2): "Your Lordships find that the dock called Lungley's Dry Dock was the only dry dock in the Thames which could take in the *Indian Empire*, and that even into this dock the ship could not be received without taking off the lower half of the paddle-wheels." Lord Penzance said (3): "In construing the meaning and extent of this 'liberty' I think great latitude should be allowed. To state at length in writing all that the vessel might be intended to be allowed to do in going to the dry dock, in lying there while repaired, and then returning, the length of time to be occupied . . . . could not be comprised in any but a very lengthy document. The convenience of mercantile transactions makes this impossible in many cases; and in this mercantile contract of insurance especially, it is always the custom to express the mutual bargain in short and conventional terms. In construing such terms, it is always to be borne in mind that the object of insurance is indemnity from the risks attending some commercial adventure or operation which the owner of the subject of insurance is engaged upon; and it is well understood by both parties that the desire and object of the assured is that the policy should extend to all such risks, of the character insured against, as may arise by the adventure or operation being carried out in the usual and ordinary manner. The assured, therefore, is not intended to be bound to make his mode of carrying out the adventure conform to the words of

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(1) 1 App. Cas. 498.

(1) 1 App. Cas. 502.
(2) Ibid. 503.
(3) Ibid. 507.

the policy, rigidly construed, and confined to what is absolutely necessary; but the general words of the policy are intended to be construed so as to conform to the usual and ordinary method of pursuing the adventure." It is obvious that in construing a liberty such as the one in the present case one must give a reasonable interpretation to it, and in my opinion it certainly extends to a dry dock or a gridiron which upon the evidence was the most convenient, if not the only, place to which this vessel could go. The evidence was to the effect that there was no place so near as or more suitable than this yard on the Itchen, and this evidence was not contradicted. Therefore we have the case of a vessel proceeding to a dock within the port as being the most convenient place, and without incurring any increased marine risk because it proceeds there in smooth water. It appears to me therefore that it is impossible to narrow that liberty so as to exclude this dock. Whether or not it would enable the vessel to proceed to a dock outside the limits of the port in which she was then lying is a different question. I think therefore that she was within the docking liberty. Upon all the other points, as I have said, I entirely agree with what has been said by Scrutton L.J. For these reasons I think that the appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Constant & Constant.*
Solicitors for defendant: *William A. Crump & Son.*

W. F. B.

[IN THE COURT OF APPEAL.]

In re A DEBTOR.

C. A.
1919
Nov. 21.

[No. 446 of 1918.]

Bankruptcy—Receiving Order—Payment of Debts in Full—Motion to rescind—Request by Official Receiver for public Examination—Discretion of Registrar—Jurisdiction—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *ss.* 29, 108.

Where a debtor applies to the Registrar in Bankruptcy to rescind a receiving order made against him, on the ground that all his debts have, since the making of the order, been paid in full, and the Official Receiver states that in his opinion the receiving order should not be rescinded until the debtor has undergone a public examination, the Registrar is not bound by that opinion, though in the independent exercise of his discretion he ought to give proper weight thereto.

In re Wemyss (1884) 13 Q. B. D. 244; *In re Leslie* (1887) 18 Q. B. D. 619; and *In re Izod* [1898] 1 Q. B. 241; considered.

Appeal from an order of the Registrar in Bankruptcy.

On April 9, 1919, a receiving order was made upon a creditor's petition against the debtor. By divers orders made from April 12, 1919, to October 20, 1919, advertisement of the receiving order had been stayed. It appeared that in the meantime the debtor had filed a statement of his affairs which had undergone considerable investigation by the Official Receiver, who had on many occasions cross-examined the debtor upon it. From time to time, as the price of obtaining a stay of the advertisement of the receiving order, the debtor had been ordered to pay to the Official Receiver considerable sums of money, all of which orders he had complied with. Ultimately the debtor, having obtained the assistance of his friends in the payment of his debts, moved for an order that the receiving order might be rescinded on the ground that the debtor had paid or was about to pay all his debts in full, and for an order that the Official Receiver be directed to distribute the assets in his hands so as to enable the debtor to proceed with his application to rescind the receiving order, and for a further stay of the advertisement thereof.

The motion came before the Registrar on October 20, 1919, when the debtor's application was opposed by the Official Receiver, who asked that before the receiving order was rescinded the debtor should submit to a public examination.

The grounds upon which the Official Receiver based his request were (1.) That the debtor had given varying statements of his liabilities. (2.) That he had dealt with his assets after bankruptcy. (3.) That he had misrepresented his financial position. (4.) That there ought to be a public examination in order to discover how the debtor had got rid of certain claims. (5.) That the Official Receiver did not believe the debtor had disclosed all his liabilities. (6.) That the Official Receiver could not at present tell what bankruptcy offences had been committed by the debtor. (7.) That there would not be payment in full of all the creditors if the debtor's scheme were carried out.

It was contended on behalf of the debtor that there had already been a very full private investigation of the debtor's affairs and that the Official Receiver had in his hands sufficient funds to pay 20*s.* in the pound upon the debts and all costs and charges.

It was also suggested on the debtor's behalf that if necessary he might be further privately examined under s. 25 of the Bankruptcy Act, 1914.

The Registrar in the course of his judgment said that he had to exercise his discretion and in that he must be guided by the previous decisions of the Courts upon this point. In *In re Leslie* (1) the Official Receiver stated that he required a public examination apparently without giving any grounds, but he said he was not satisfied with the debtor's conduct. The Divisional Court (Mathew and Cave JJ.) upon that held that there must be a public examination. In *In re Izod* (2) what the Court seemed to lay stress on was that the Official Receiver was not able to inform the Court of any ground upon which further inquiry was requisite. A. L. Smith L.J. said: "The feature of this case upon which I wish to lay emphasis as differentiating it from ordinary cases is that the public officer whose duty it was to investigate the debtor's conduct, if there were any ground for suspecting misconduct on his part, never asked for any public examination of the debtor, or made any suggestion of misconduct on his part, but appears to have been content that the receiving order should be rescinded." He (the Registrar) read that case as practically deciding that when the Official Receiver, whose duty it was to investigate the debtor's conduct, suggested any misconduct on his part, and asked for a public examination, there the receiving order should not be rescinded until the public examination had been held. As this application was also based on s. 29 the Registrar thought that *Ex parte Wemyss* (1) was to the same effect. The point there seemed to be that "The Official Receiver examined the debtor's vouchers and expressed himself satisfied, and he stated that there appeared to him to be no objection to the application arising out of the statement of affairs or out of the debtor's conduct." In this case the Official Receiver had examined the vouchers, but he had not expressed himself satisfied. If that had been the case in *Ex parte Wemyss* (1) the Registrar did not think the Court would have granted an annulment. In *In re Taylor* (2) it had been decided that on an application for annulment under the old s. 35 the Court, even though the liabilities had been discharged in full, if it were not satisfied with the conduct of the debtor, might still refuse to annul the adjudication. Therefore whether the case were regarded as under s. 108, or, as in *Ex parte Wemyss* (1), under s. 29, if the Official Receiver, a high official of the Court, came before him (the Registrar) and told him he was not satisfied and asked for a public examination he felt bound by all the decisions to say that there must be a public examination before the application to rescind could succeed. The Registrar added that he should be glad to have the view of the Court of Appeal, because he felt that the dicta in *In re Izod* (3) intimated that in every case where the Official Receiver said there must be publicity the Registrar in his discretion ought to grant the Official Receiver's application and not rescind the receiving

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(1) 18 Q. B. D. 619.

(2) [1898] 1 Q. B. 241, 246.

(1) 13 Q. B. D. 244.

(2) [1901] 1 K. B. 744.

(3) [1898] 1 Q. B. 241.

order until there had been that publicity which the Official Receiver thought necessary. He accordingly refused the debtor's application.

The debtor appealed.

Clayton K.C. and *Tindale Davis* for the appellant The Registrar has misdirected himself in thinking himself bound to accede to the request of the Official Receiver for a public examination. He has not exercised his discretion in the matter. The primary object of the bankruptcy jurisdiction is to enable the creditors to get their debts paid, and where they have been paid in full, unless a prima facie case be made of the commission by the debtor of a bankruptcy offence, he has satisfied the requirements of the bankruptcy law, and is entitled to have the receiving order rescinded: *Ex parte Wemyss.* (1)

There is clearly jurisdiction to rescind, and the exercise of that jurisdiction is a matter of discretion. In *In re Hester* (2) the order of rescission was held to have been rightly refused but the existence of the discretion was not disputed. See also *In re Dixon and Cardus.* (3)

Of course where there is misconduct on the part of the debtor the Court will refuse the order: *In re Taylor.* (4) A receiving order may be rescinded in cases where an adjudication of bankruptcy could be annulled—namely, where all the debts have been paid in full, or where the adjudication ought never to have been made.

In re Izod (5) is a stronger case than this, for there the debts were not being paid in full. Here the Registrar has not independently exercised his discretion.

[LORD STERNDALE M.R. Is not the only question before us whether the Registrar is bound by the view of the Official Receiver?]

Yes.

Sir Gordon Hewart A.-G. and *E. W. Hansell* for the Official Receiver.

(1) 13 Q. B. D. 244.

(2) (1889) 22 Q. B. D. 632.

(3) (1888) 5 Morrell, 291.

(4) [1901] 1 K. B. 744.

(5) [1898] 1 Q. B. 241.

Having regard to all the circumstances of the case the Registrar in the exercise of his discretion thought that the Official Receiver was right. He was satisfied that the grounds put forward by the Official Receiver were good, but even if not so satisfied he would have felt himself bound by the view of the Official Receiver, and he stated that he would like the opinion of this Court. In saying that he may have gone too far. It was for him to exercise his discretion, and it is submitted that he has rightly done so.

Cannot for the petitioning creditors was not heard.

LORD STERNDALE M.R. I think that this case must go back to the Registrar. I know it may cause some expense and delay, but I think the Registrar in exercising his discretion has, through a misapprehension of some authorities which were cited to him, acted upon a wrong principle. The debtor against whom a receiving order has been made says he has paid or provided for payment of all the creditors in full, and he asks for a rescission of the receiving order. There is no question that under s. 29 (1.) of the Bankruptcy Act, 1914, the Court has jurisdiction to annul an adjudication. It seems to have been said from time to time that, although not proceeding exactly upon the same grounds, the exercise of the jurisdiction to rescind or vary an order under s. 108 should be guided broadly by the same principles that apply to the annulment of an adjudication. I do not mean to say they are absolutely the same. [The Master of the Rolls then referred to the judgment of the Registrar set out above and continued :] That seems to me to show quite clearly that what the learned Registrar did in this case was this. He said: " No doubt I have to exercise a discretion, but the cases show me that where the Official Receiver comes and says, even without grounds, referring to *In re Leslie* (1)—without showing any grounds at all—there ought to be a public examination before the rescission, I cannot make the order for rescission without public examination. I am bound in fact by his opinion."

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(1) 18 Q. B. D. 619.

The learned Attorney-General contended that although the Registrar took that view, and said that he wished for the opinion of the Court of Appeal, there was enough upon the note to show that he had in fact exercised his own discretion. I am sorry to say I do not take that view. I think what he says shows quite clearly that he began at the very foundation by saying that the cases decide that if the Official Receiver says there ought to be public examination he must also say so. That I am quite clear was wrong, and indeed it was not argued that it was right. It is in the Registrar's discretion to say whether the Receiving Order should be rescinded or not. He can say: "I will rescind it now without further proceedings at all"; or he can say, "I will not rescind it until after there has been a public examination," or he can say, if he thinks fit, that he would rescind after a private examination; or at any rate he might order that there should be a private examination before rescission. He may do any of these three things, but it is for him to decide it, and although I think the opinion of the Official Receiver, who has entire knowledge of the whole matter, is an element which would very often go pretty nearly all the way to decide the Registrar's discretion, still he must exercise it, and he must not say as I think he said here: "The Official Receiver says there must be a public examination, therefore there must be one." That it seems to me to be putting the discretion into the hands of the Official Receiver instead of those of the Registrar. For that reason I think the learned Registrar was wrong in taking the view that he did. I think, therefore, that the matter must go back to him in order that he may exercise his own discretion whether the Rescinding Order shall be granted at once, or whether there should be an examination; and he will consider whether it should be public or private, he will consider the comparative merits of publicity or privacy, and, having exercised his own discretion, he will then make or refuse the Order. I do not think it is right to indicate any opinion at all as to what sort of order he ought to make; that is for him.

With regard to costs, I think the costs of this appeal should be costs in the application to rescind, and should follow the result of the decision on that application.

ATKIN L.J. I agree. I do not think it necessary to repeat what has been said by the Master of the Rolls in reference to the grounds of the learned Registrar's decision in this case. It appears to me plain that he unfortunately misdirected himself as to the law, and the result is that he has not yet exercised his discretion as he should exercise it, untrammeled by a mistake as to the law. I think therefore that the case must go down to him to consider the matter, and in dealing with it I think it would be probably convenient to add that nothing we are saying is to be regarded as an intimation to the Registrar that he ought not to give full weight to the opinion expressed before him by the Official Receiver, who is the person charged to a large extent with the investigation as to the conduct of the debtor. In exercising his judicial discretion the Registrar has to consider the rights of the debtor as well as the rights of creditors and the interests of the public. And I think that he probably would not attach much weight to the opinion of the Official Receiver on a matter of this kind unless the Official Receiver lays before him some kind of reasonable grounds for his view; in other words I doubt whether the learned Registrar, in wisely exercising his discretion, would be right in acting upon the mere ipse dixit of the Official Receiver. In this case the Official Receiver has given, as one would have expected, a number of grounds for his belief, which the learned Registrar will no doubt weigh in coming to a conclusion, and in coming to a conclusion it may be, of course, that he will consider that that which has been put before him by the Official Receiver still requires some further elucidation or inquiry which may possibly be short of a public examination.

But if he is satisfied with the grounds which are put before him as they stand, he will then have to make up his mind whether those grounds do or do not lead him to the conclusion that there ought to be further publicity in this matter. All these matters are open to him, and all that we decide at the present moment is, that, in coming to the conclusion he did, he acted on a wrong view of the law, and the case must go back. I agree with what has been said by the Master of the Rolls as to costs.

YOUNGER L.J. I am of the same opinion.

Cannot for the petitioning creditors asked for an order for the costs of their appearance.

The Court refused to make the order.

Appeal allowed.

Solicitors: *E. A. Fuller.*

Solicitors to Board of Trade: *Woolfe & Woolfe.*

G. A. S.

[IN THE COURT OF APPEAL.]

C. A.
1919
Dec. 9.

THE KING *v.* COMMISSIONERS FOR THE SPECIAL PURPOSES OF THE INCOME TAX ACTS.

Ex parte DR. BARNARDO'S HOMES NATIONAL INCORPORATED ASSOCIATION.

Revenue—Income Tax—Exemption of Charities—Residuary Bequest—Executors' Assent—Relation back to Death—Income Tax on Interim Dividends—Income Tax Act, 1842 (5 *&* 6 *Vict. c.* 35), *s.* 88, *Sched. C, r.* 3 ; *s.* 105.

By s. 88, Sched. C, r. 3, of the Income Tax Act, 1842, coupled with s. 105 of the Act, charitable institutions are exempted from the duties on any yearly interest or other annual payment chargeable under Sched. D in so far as the same shall be applied to charitable purposes only, and the exemption is to be allowed by the Commissioners for Special Purposes on due proof before them.

A testator who died on November 14, 1914, by his will bequeathed all the residue of his property, which consisted of stocks and shares, to a charitable institution absolutely. A question having arisen with regard to the testator's will litigation ensued, but in March, 1916, a compromise was arrived at under which the charitable institution retained two-thirds of the testator's residuary estate. Between the date of the testator's death and December 4, 1916, when the residue was finally ascertained and distributed, the executors received income

REX v. COMMISSIONERS FOR SPECIAL PURPOSES OF INCOME TAX ACTS.

DR. BARNARDO'S HOMES NATIONAL INCORPORATED ASSOCIATION, *Ex parte.*

of the estate from which income tax had been deducted at the source. The income so received by the executors was part of the fund handed over in due course by them to the charitable institution. The institution now claimed the return of the income tax deducted on the ground that the deduction was contrary to s. 105 of the Income Tax Act, 1842:—

Held, that as the residue was not ascertained until December 4, 1916, when the executors assented to the bequest and distributed the residue, the payment by deduction of income tax made by the executors in respect of the income was not made by them on behalf of the residuary legatees, the doctrine of relation back of the executors' assent to the testator's death having no application to the case of a residuary bequest, and that the institution was therefore not entitled to repayment of the income tax so paid.

Decision of the Divisional Court ante, p. 26, reversed.

APPEAL from a decision of the Divisional Court—Earl of Reading C.J. and Darling and Bray J.J. (1)—making absolute a rule for a writ of mandamus directing the respondents, the Commissioners for the Special Purposes of the Income Tax Acts, to allow to the applicants, Dr. Barnardo's Homes National Incorporated Association (hereinafter called the Association) exemption from income tax of the income of trust funds held under the will of one Denzil Thompson deceased, and to repay the sum of 332*l.* 0*s.* 7*d.* deducted for income tax.

The testator by his will, dated June 3, 1914, after appointing executors thereof and making certain specific and pecuniary bequests, bequeathed all the residue of his property, which consisted of various stocks and shares, to the Association absolutely.

The testator died on November 14, 1914, and his will was duly proved by his executors in common form on December 24, 1914.

A question having shortly after arisen with regard to the will, the executors in 1915 issued a writ in the Probate Division in order that the will might be proved in solemn form.

On March 9, 1916, the action was compromised on the following terms:—

"(1.) The last will to be proved in solemn form without any further opposition.

(1) Ante, p. 26.

(2.) The executors to pay or hand over to the next of kin or their solicitors Messrs. Willis & Willis, upon production to them of an authority to receive the same, one-third of the capital of the testator's estate and one-third of the income which has accrued due since his death.

(3.) The capital of the estate for the purpose of the last preceding term to be arrived at by taking the gross estate and deducting therefrom (1.) the testator's debts and funeral expenses, including sums paid to Dr. Butler and Mrs. Dover, (2.) the estate and legacy duties, (3.) the costs of proving the will in common form, and of the collection and distribution of the estate and (4.) the legacies bequeathed by the will, but no costs of this action are to be deducted."

The terms of compromise also provided that each party should pay his own costs of the action and that the costs of the executors should come out of the two-thirds of the residuary estate.

In accordance with this compromise the executors proved the will in solemn form.

Between April 11 and May 15, 1916, the executors sold the stocks and shares comprised in the residuary estate except certain American securities.

Between September, 1916, and December 4, 1916, when the residuary estate was finally ascertained, the executors made certain payments relating to their costs of the suit, leaving a sum in their hands which was distributed by them on December 4, 1916.

During the period between November 14, 1914, and December, 1916, the executors received income from the trust funds belonging to the testator's estate, from which income tax had been deducted at the source. The income was part of the fund handed over in due course to the Association, the residuary legatees.

The Association now claimed the return of the income tax deducted from the income of the securities on the ground that it was a tax on dividends appropriated for charitable purposes deducted contrary to s. 105 of the Income Tax Act, 1842. It was not disputed that the Association were an institution for charitable purposes within the meaning of the statute.

The Divisional Court held that the assent of the executors which had clearly been given by December 4, 1916, related back to the date of the testator's death, and that as it was not the intention of the Legislature to allow exemption to depend upon delays caused by administration or litigation, but to allow exemption where funds were to be used for charitable purposes only, the income of the securities was entitled to exemption as from the date of the testator's death. They accordingly made absolute the rule for the writ of mandamus as above stated.

The Commissioners appealed. There was no appeal on the question of costs decided by the Divisional Court.

Sir Gordon Hewart A.-G., *Clayton K.C.*, *Sheldon*, *T. H. Parr*, and *R. P. Hills* for the Commissioners. It is submitted that the Association are not entitled to repayment of the income tax claimed. It was paid at a time when the property in respect of which it was assessed was the property of the executors, and not the property of the Association. What a residuary legatee receives is a lump sum in the nature of capital and not a sum consisting partly of income and partly of capital. It cannot be split up into capital and income. The dividends which have accrued since the death are an accretion to the capital. The residue is what is left after the payment of all the debts, legacies and costs of administration.

It is conceded that the Association are a charitable institution and that the dividends if they had been the property of the Association would not have been subject to deduction of income tax; but they were not. The Association were never entitled to any of the investments producing the dividends. What they were entitled to was a lump sum of cash representing two-thirds of the corpus and dividends since the death. This sum was capital which could not be analysed into capital and income. The payment made to the Association during the interval between the death and the date of the final distribution was part of the lump sum. Until the residue was ascertained, there was nothing to which the Association were entitled: *Allhusen* v. *Whittell* (1); *Attorney-General* v. *Lord G. Cavendish.* (2) Different considerations apply in the case of tenant for life and remainderman, and cases relating to them are not applicable in the present case.

The doctrine of relation back on which the decision in the Divisional Court proceeded is not applicable to the case of a residuary bequest. The only assent in such a case is payment over by the executors to the residuary legatees. The misapprehension on this point was no small ground of the decision in the Divisional Court. Until the residue is ascertained you cannot distinguish between income and capital.

Disturnal K.C. and *Dighton Pollock* (*Clauson K.C.* with them) for the Association. The Attorney-General has rested his case on the foundation that the whole of what came to the Association was a capital sum and that no part of it consisted of income. It is submitted that the Association are entitled to repayment of all tax deducted up to the time the residue was ascertained and the fund distributed by the executors.

[LORD STERNDALE M.R. Can you earmark the proportion of the particular dividends paid to you?]

Yes: the accounts exhibited show that. What you have to look at is what was the estate of the testator at his death, that is, what was included in probate affidavits and accounts for estate duty? The residuary legatees had rights in that estate to which effect would have been given by the Chancery Division in an administration action. It cannot matter for the purposes of this case whether it takes a few weeks or years before the ultimate residue is ascertained. In the Income Tax Acts a distinction is drawn between capital and income. Under Sched. D trustees are chargeable to income tax. It is true here that the tax was deducted at the source and that the executors did not therefore become liable for it. It is submitted however that it cannot and should not

(1) (1867) L. R. 4 Eq. 295.
(2) (1810) Wightw. 82, 94.

make any difference whether the benefits a legatee receives under a will are residuary, specific, or general. The matter cannot depend on the exact way in which the executors keep their accounts. The case turns on the construction of the Income Tax Acts. It has nothing to do with doctrines which apply as between executors and beneficiaries. Why should it happen that because a charity receives a fund as residue it cannot obtain an exemption which it would be entitled to if the fund were general or specific? It is submitted that the Association clearly come within s. 88, Sched. C, r. 3, of the Income Tax Act, 1842.

[ATKIN L.J. Who were the persons entitled to the dividends at the time the income tax was deducted?]

It is submitted that as soon as the residue was ascertained the Association were entitled to the dividends.

The Legislature can never have intended by this provision in the Act to penalize a charity because the administration of the estate took longer than was perhaps necessary. It is not suggested that the charity should interfere with the due course of administration.

The Commissioners in dealing with the Association's claim for exemption did not attempt to analyse this fund and say that some of it did not go to the charity. If no income tax had been paid the fund received by the Association would have been increased by 332*l.* 0*s.* 7*d.* The terms of the compromise arrived at by the parties to the probate action must be taken as inserted in the will.

[YOUNGER L.J. Surely not so as to bind the Revenue authorities who were no parties to it.]

The burden which the Association have borne is the tax upon income. The executors were interposed for the purposes of administration.

When you look at the destination of the fund you see that the burden has been borne by the residuary legatees. *Attorney-General* v. *Lord G. Cavendish* (1) which was relied on by the appellants turned on the construction of an old Act. To work out the Income Tax Acts regard must be had to the ultimate destination of the fund. Sect. 105 of the Act of 1853 must be read with s. 88, Sched. D, r. 3, of the Act of 1842.

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(1) Wightw. 82.

It is submitted that the Association have always had a right, although perhaps an inchoate one, to the fund to which they were found to be ultimately entitled, and were therefore entitled to exemption from tax on the income.

It is said that the principle of assent as such does not apply to a residue. It is submitted however that that principle may be applicable to a residuary gift. There is no authority to the contrary. But assume that it is not. On the authorities a gift of residue carries with it the intermediate income: *In re Holford.* (1) The executors could no doubt use either the capital or the income to pay the debts, but there must be a subsequent adjustment.

To whom did the income belong if not to the potential beneficiaries? It did not belong to the executors or to the creditors, but to the executors as trustees for the potential beneficiaries. *Allhusen* v. *Whittell* (2) is an authority for the proposition that a residuary legatee is entitled to the residue as from the death of the testator, subject to adjustment. Here the lump sum paid over does in fact consist partly of income and partly of capital and the income paid over ought to be treated as income. Income tax has been paid on that income and the Association are entitled to have it repaid to them.

[YOUNGER L.J. referred to Williams on Executors, 10th ed., vol. ii., p. 1566.]

[They also referred to Williams on Executors, 10th ed., vol. ii., p. 1101.]

Sheldon in reply. In order to entitle a charity to exemption from income tax three conditions must be fulfilled. (1.) The income must belong to the charity, (2.) the income must during the relevant period be applicable to charitable purposes only, (3.) it must be so applied. That this is so appears from s. 88, Sched. C, r. 3, and s. 105 of the Income Tax Act, 1842. In the present case up to December 4, 1916, no one

(1) [1894] 3 Ch. 30, 44.

(2) L. R. 4 Eq. 295, 302, 304.

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could tell how much of the fund handed over by the executors to the Association represented income. The fund never belonged to the Association at any time as income. There was no distribution of the residuary estate in specie. The executors realized it and handed over the net proceeds to the Association.

There is no such thing as an assent to a residuary gift, the whole object of an assent being to complete the title of the specific legatee to the particular legacy. When the executor has assented to the various specific gifts he has a residuum which is available for the residuary legatees.

On the accounts in the present case it is impossible to ascertain what part of the income or capital was applied in paying the costs of the administration. All the items of property which produced income had been sold, and what the executors divided was cash. There can be no assent to a residuary gift till payment. An actual payment on account is not an assent. There is nothing to which the assent can relate back. The doctrine of relation back is therefore not applicable to the case of a residue. The whole doctrine of assent is based on this, that the executor says to the legatee that what the testator has given him he can have because he (the executor) does not require it for payment of the debts and costs of administration. The question then is what is a distributive share, and that can only be ascertained by an account in Chancery. An action at law would never lie against an executor who has said that a particular thing belongs to the legatee because by so saying he has constituted himself a trustee of it for the legatee. An executor is therefore never a debtor or the holder of any particular item of property for the residuary legatee. *Allhusen* v. *Whittell* (1) was a case of equitable bookkeeping. The Association have no right to dissect the executors' accounts. They had no right of property in any of the items of the testator's estate. The income was never applicable nor applied for charitable purposes, because up to December 4, 1916, it was required by the executors for the purposes of administration. [He also referred to *In re McEuen* (1); *Powell* v. *Riley* (2); *Roffey* v. *Early* (3); Theobald on Wills, 7th ed., p. 154.]

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(1) L. R. 4 Eq. 295.

Lord Sterndale M.R. This is an appeal from a decision of the Divisional Court making absolute a rule for a mandamus calling upon the Commissioners for the Special Purposes of the Income Tax Acts to allow exemption from income tax on the income of certain funds held under the will of Mr. Denzil Thompson and to repay a sum of 332*l.* 0*s.* 7*d.* which had been deducted for such income tax. The rule was moved for on behalf of the Association, the ground being that the Association being a charitable institution were entitled to this return of income tax because the income tax had been charged upon income which was devoted by them as a charitable institution to charitable purposes.

Mr. Thompson died in November, 1914, having by his will made certain specific and pecuniary bequests, and bequeathed all the residue of his estate and effects, subject to the payment of his debts, funeral and testamentary expenses, to the Association absolutely. The will was proved very soon after the testator's death in common form. Then a question arose as to it and litigation followed, the result of which was that a compromise was arrived at by which it was agreed that the will should be proved in solemn form without any further opposition, and that after making certain other arrangements, one-third of the residue of the estate should go to the next of kin, and two-thirds of it to the Association. It was also agreed that the next of kin should receive one-third of the capital of the estate and one-third of the income which had accrued due since the death, the other two-thirds of course going to the residuary legatees. That litigation occupied some time, and delayed the winding up of the estate. The date of the compromise was March 9, 1916. The matter having then been settled the executors proceeded with the administration of the estate, and on December 4,

(1) [1913] 2 Ch. 704, 713.

(2) (1871) L. R. 12 Eq. 175.

(3) (1873) 42 L. J. (Ch.) 472.

1916, they arrived at the sums which were to be paid to the next of kin in respect of the one-third of the estate and to the Association in respect of the other two-thirds of the estate. It will be seen, therefore, that about two years elapsed between the testator's death and the date when the amount of the residue was arrived at. In the meantime dividends had been accruing upon the estate, moneys had been received and had been paid out, and certain moneys had been advanced by the bank for the purpose of enabling the executors to pay the duties as they could not of course touch the balances in the bank until after they had obtained probate. These advances were repaid when the executors were able to deal with the assets, with the result, as I have said, that on December 4, 1916, the amount of residue was arrived at. In the meantime income tax had been deducted at the source upon the dividends which had been received from time to time, and it is that income tax which the Association now seek to have refunded to them on the ground that these dividends were their property and were received by the executors on their behalf, and that therefore, they being a charitable institution and these being funds devoted to charitable purposes, the Association were entitled to have the income tax deducted in respect of them refunded. That depends partly upon general principles of law and partly upon the provisions of the Income Tax Act, 1842.

Sect. 88, Sched. C, of the Income Tax Act, 1842, which contain the rules for assessing and charging the duties under that schedule, provides: "The said last-mentioned duties shall be paid by the persons and corporations respectively intrusted with the payment of the annuities, dividends, and shares of annuities, therein charged, on behalf of the persons, corporations, companies, or societies entitled thereto, their executors, administrators, successors, or assigns, and shall be assessed" in the manner therein mentioned—"except in the following cases of exemption from the said duties; viz.," and then r. 3 is: "The stock or dividends of any corporation, fraternity, or society of persons, or of any trust established for charitable purposes only;

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or which, according to the rules or regulations established by Act of Parliament, charter, decree, deed of trust, or will, shall be applicable by the said corporation, fraternity, or society, or by any trustee, to charitable purposes only, and in so far as the same shall be applied to charitable purposes only." Sect. 100 deals with the income tax chargeable upon other funds, and not those contained in Sched. C, and s. 105 provides in substance that where income tax is chargeable under Sched. D charitable institutions shall have the same exemption for funds applied to charitable purposes as is provided under Sched. C. We therefore come back really in this case to Sched. C, because whether these funds fall under one schedule or the other the exemption is the same.

Now it seems to me that in order to obtain the return of this income tax it is incumbent on the Association to show that that tax was paid on their behalf in the first instance by the executors, because r. 3 under Sched. C provides, as I have read, that the duty shall be paid by the persons and corporations respectively intrusted with the payment on behalf of the persons and corporations entitled thereto. If, therefore, the Association cannot show that those dividends received before December 4, 1916, during the administration of the estate were received on their behalf it seems to me they fail in limine.

The position was this, as I have said, up to December, 1916, the residue was not ascertained, and not only was not ascertained, but it really did not exist. I have always been under the impression that a residue does not really come into existence until all the payments have been made which are necessary to arrive at it, and I am glad to find that that view is expressed very clearly by Sir George Jessel in *Trethewy* v. *Helyar.* (1) He there says: "It appears to have been long-settled law that there is no residue of personal estate until after payment of the debts, funeral and testamentary expenses, and all costs of the administration of the estate of the testator. Therefore, until you have paid the costs,

(1) (1876) 4 Ch. D. 53, 56.

you do not arrive at the net residue at all, and when you do arrive at it, it is distributed according to law. That is the principle."

The only way in which the executors in this case could have been paying the income tax on behalf of the Association would have been if the Association were the persons entitled to the dividends and income. The executors as soon as the residue was ascertained became trustees for the residuary legatees of that fund, but until that was ascertained there was no fund of which they could or did in fact become trustees for the residuary legatees. The income that they were receiving in the meantime was income which they were receiving, not on behalf of the residuary legatees at all, but on behalf of themselves as executors for application in the due administration of the estate. I think, therefore, that these dividends and this income up to December 4, 1916, when the residue was ascertained, were not received on account of the residuary legatees at all, and that the residuary legatees were not the persons entitled to that income or to those dividends, and therefore that the income tax was not paid on their behalf. That I think is sufficient to dispose of the case.

In the Divisional Court the decision proceeded very much upon the doctrine of relation back as applied to the assent of an executor to a legacy, and the Court seem to have held that the executors having assented to the bequest of the residue by the payment of it in December, 1916, that assent related back to the date of testator's death. I do not propose to discuss at any length whether an executor does or does not, or can or cannot, assent to a residuary bequest. There seemed to me to be a little difference of opinion between the learned counsel who argued the case for the respondents upon the point. But it appears to me to be obvious that if an executor can, and does, assent in any way the operation and incidents connected with his assent are absolutely different in the case of a residuary bequest from what they are in the case of a specific bequest. In the case of a specific bequest at the time of the death of the testator

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there does exist the thing which he bequeaths. It may be a horse; he bequeaths that horse, and upon the executor assenting to that bequest the title of the legatee to the horse dates from the death of the testator. In the case of a residue the thing does not exist. As I have pointed out there is no such thing as a residue until the estate has been administered and the residue has been ascertained. No assent could possibly take place in this case before December 4, 1916, because there was nothing before that date to which that assent could attach. There might be a promise to pay the residue when ascertained, but that is an entirely different thing from an assent to the bequest of a specific thing. If there be such a thing as an assent it seems to me it cannot possibly relate further back than the date at which the thing to which the assent attaches comes into existence, and the first date that that can be in this case, I think, would be December 4, 1916. I prefer not to put my judgment in this case upon the doctrine or principle of assent at all. I put it upon the ground that these dividends and this income, up to December 4, 1916, were not in fact received on account of the Association, and that therefore the income tax that was paid by deduction was not paid on their behalf. The fund that the Association received was the residue when ascertained. It is quite true that into the making up of that fund two things entered, the capital of the testator's estate and the income derived from it, but those two things formed but one fund, to which the Association were entitled when it was ascertained, and I think, as I have said, that the income tax was not paid on their behalf. The income and the dividends were not received on their behalf, and it is practically impossible to tell out of what funds the executors made their payments in the administration of the estate. They received the funds generally, and they made the payments generally, and there were no specific dividends or income received on account of any particular legatee, certainly not on account of the Association.

I think, therefore, that this appeal must be allowed, with the result that the rule will be discharged.

ATKIN L.J. I agree. It appears to me that the Association have to bring themselves within either s. 105 or s. 88; in fact, I think they have to bring themselves within both sections. Sect. 105, which contains the exemption from duties on interest chargeable under Sched. D, has been read by the Master of the Rolls, and s. 88, which contains the exemption in respect of the duties charged under Sched. C, provides [His Lordship read the section and continued :]. It appears to me that the same principle has to be applied to the claim in respect of exemption from duties charged under Sched. D. In other words, it is in respect of payments which have been deducted on behalf of the persons entitled thereto. I think therefore that the Association have to establish that the duty was deducted from dividends to which they, the Association, were entitled.

Now how did they attempt to establish that? I leave out of account the question as to the dividends which would be apportionable as belonging to the testator's estate. It appears to me quite plain that a very large proportion of the duty was in fact duty which was charged in respect of interest which accrued during the testator's lifetime. But that is not the material point in this case, because we have to decide the question of principle. I will treat the question as being confined solely to duties deducted from dividends which accrued entirely after the testator's death. Now were the Association entitled to those dividends when the duty was deducted from them? It appears to me that they were not. They were left the residue of this estate, and it seems to me plain that they did not become entitled to that residue until it came into existence and was ascertained, in other words, until the estate was administered, so that the executors were able to know what the fund was which they were eventually bound to hand over to the Association. On that simple ground I think that the claim must fail.

It is said, however, that though that might have been so at the particular moment at which the interest was deducted and the dividends were received by the executors, yet the title of the Association related back to the testator's death

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as soon as the executors had fully administered the estate, and had intimated to the beneficiaries that they had done so and had pointed out to them what the exact amount of the residue was, in other words, had said that they assented to the legacy.

Now in respect of that matter no authority has been produced before us to establish that the doctrine of relation back of a legatee's title upon the assent by the executors to the legacy in the case of a specific legacy applies in the case of a residuary bequest, and on principle one is not surprised that there should be that lack of authority. The two things appear to differ essentially because whereas in the case of a specific legacy there is something which had an existence at the date of the death, and which the testator intended the legatee to receive in that form, on the other hand in the case of a residue there is, generally speaking, something which was not then in existence and which the testator did not intend the legatee to receive in any form in which he possessed it at that particular time. It is not merely that the amount of the legacy is not ascertained, but that the legacy itself is not even in existence in the form in which it is bequeathed to the legatee. It appears to me that there is no authority for the proposition that the title of a residuary legatee relates back to the death as soon as the executor has ascertained the amount and has intimated to the legatee what that amount is. I think on principle there should be no relation back in such a case.

It is to be noticed that one of the results of so holding is, as was pointed out by the Attorney-General, that, generally speaking, this result is more favourable perhaps to the community than the opposite result would be, because if, in fact, the legatee who receives a residuary bequest does not receive it divided up into capital and income, but receives it as a lump sum by way of capital, then it is plain that the Revenue authorities are not entitled to say that he has received so much capital and also so much income, and therefore they are not entitled as against him to apportion the income so as to say that he has received income for the purpose it may be of super-tax, or for the purpose of diminishing or removing altogether any right to abatement to which he may be otherwise entitled.

However, we have not to determine this case by reason of the consequences which may follow. It appears to me that the claim of the Crown here is correct, and this appeal should be allowed.

Younger L.J. I am of the same opinion. It was, I think, conceded by Mr. Disturnal that no claim could be made by the Association except in respect of the income tax deducted from some dividend or interest to which they can now say that they were entitled at the date of the deduction. It is accordingly necessary that their title at that date to the dividends from which the deduction was made should be established.

Now the administration of this estate, as one sees from the accounts to which Mr. Sheldon has called our attention, has been of the most ordinary and usual kind, the result of which has been, as is the case in the great majority of estates consisting of personal property only, that the actual ascertained residue available for division amongst the residuary legatees represented in fact the proceeds of sale of the testator's entire estate, income upon portions of that estate received by the executors prior to the sale, interest received by them in respect of money lent or on deposit, less the costs of administration, the debts paid, the legacies satisfied, and the charges and expenses of the executors defrayed. The executors are left with a net sum available for division under the agreement which was come to in the Probate Court, to which I will refer in a moment, and which only has effect, as I understand it, as an agreement made by the persons who were the sole residuary legatees, and who were sui juris, with other persons who in that Court were in danger of establishing a claim by direction of the persons entitled under the will, this residue which would have gone to them is to be divided in the proportions set forth in that agreement between themselves and the claimants.

Now what was the particular fund which was available for division in December, 1916? The answer is, a clear ascertained balance of cash. And if there had been no more in the case I myself doubt whether it would have occurred to the advisers of the Association that they could make any claim against the Crown in respect of any deduction of income tax which had been made prior to the time when the balance was ascertained, and for this reason, that it would have appeared impossible for anybody to state what was the original source of any part or proportion of that nett ascertained balance. I think also that that is confirmed by what the Master of the Rolls has read from the judgment of Sir George Jessel in *Trethewy* v. *Helyar* (1), and by what one, I think, has always understood to be the principle applicable to such matters, which is this, that until the residue is ascertained, and until its existence as net residue has been acknowledged by the executor, either by payment to the residuary legatee, or, if the residue be settled, by the appropriation of a fund to meet the settled residue, the residuary legatee has no interest in any specific part of that which subsequently becomes residue as a specific fund, but that his right is, until that moment of time arrives, subject of course to any interim distribution, to have the estate administered in due course, the debts and the legacies and the expenses paid, that which remains realized, and the net proceeds handed over to himself as a specific fund to which he is entitled as such only after all those preliminary matters of administration have been carried out and adjusted.

Now that is the ordinary case, and that would have been this case here but for an agreement which is really, as it seems to me, entirely irrelevant to the particular rights of the parties, but which has brought into existence the claim now made with a force that I think otherwise that claim would not have been felt to possess. I look at the terms of settlement of the Probate action, and I find that the first clause is this: "The last will to be proved in solemn form without any further opposition." That means that the testator's wishes as expressed in his will are to have full testamentary effect. We then come to the subsequent arrangements made as between themselves by the Association and the next of kin, the persons claiming that fund, and the first is this : " (2.) The executors to pay or hand over to the next of kin or to their solicitors Messrs. Willis & Willis upon production by them of an authority to receive the same one-third of the capital of the testator's estate and one-third of the income which has accrued due since the date of his death." Now these parties have purported to agree among themselves to a division of one-third of the income which has accrued since the death, and it is noticeable that this sum of 332*l.* 0*s.* 7*d.* (which is the sum which it is said is admitted by the Attorney-General for the purposes of discussion), while it represents two-thirds of the actual income tax on the income which has been received since the date of the death, represents also, as to a substantial portion of it, income tax on income which had accrued before the death of the testator. The agreement continues : " (3.) The capital of the estate for the purpose of the last preceding term to be arrived at by taking the gross estate and deducting therefrom (1.) the testator's debts and funeral expenses, including sums paid to Dr. Butler and Mrs. Dover ; (2.) the estate and legacy duties ; (3.) the costs of proving the will in common form, and of the collection and distribution of the estate ; and (4.) the legacies bequeathed by the will but no costs of this action are to be deducted." That is to say, the parties by agreement between themselves, they being the only persons now beneficially interested, agreed to the marshalling of particular claims in the testator's administration upon capital irrespective altogether of what, in a question between income and capital, would be the true incidence. Then, " each party is to pay his own costs of this action," and so forth.

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(1) 4 Ch. D. 53, 56.

What we find, therefore, is this, that the parties in the Probate action by agreement between themselves to which the Crown was no party, and for their own convenience, have in point of fact (and they were quite entitled to do so) agreed that there shall be appropriated in respect of what

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is called a fund of income, to one of the parties one-third of it, and in respect of what is called another fund of income, to the other parties two-thirds of it, and then that party entitled to two-thirds of income, which under this settlement he claims to have received as such, comes and says: "Now this has been my income all through; this is the income on my part of the residue which has now been ascertained; from that income which was mine all through, as is shown by this settlement, there has been a deduction in respect of income tax. I am a charity, and I ask that that which has been deducted shall be repaid to me."

Now, as I say, the terms of this settlement do give a force to that contention which it would altogether lack if this division, instead of being arranged in this way, had simply been, as it well might have been without altering a figure in the result, that one-third of the fund in the hands of the executors representing residue is to be paid to the next of kin and two-thirds of the fund representing residue is to be paid to the persons named under the will as entitled to the whole. If those had been the terms of settlement then it appears to me that there would have been nothing, even on paper, to instruct the present claim. But it seems to me, also, that a settlement of this kind can make no difference to the rights either as between executors or residuary legatees on the one hand and the Crown, against whom this claim is made, on the other. This as a settlement is really, as it seems to me, irrelevant to the actual question which has to be determined, although the form in which it is couched may suggest the very claim which is made.

The matter is not altogether unimportant. It is important in this sense, that if it had not been possible for the Association relying on the terms of the agreement to make a definite claim to a sum of 332*l.* 0*s.* 7*d.* it would have been found to be absolutely impossible to make a claim to any definite sum at all, and the fact that it would have been impossible to frame a claim for any definite sum at all goes to confirm the view which has been expressed by the other members of the Court, and in which I concur—namely, that the only real right either in the next of kin or in the Association under this settlement is to receive by virtue of the agreement, in the one case one-third and in the other case two-thirds of the net sum which represents the net proceeds of the realization of the whole of the testator's estate after all prior charges and debts and legacies have been defrayed, until which moment, it appears to me, there was no right on the part of either of these parties to any part of that estate as being specifically their own.

Appeal allowed and rule discharged.

Solicitor for Commissioners: *The Solicitor of Inland Revenue.*
Solicitors for Association: *Nisbet, Daw & Nisbet.*

W. I. C.

[IN THE COURT OF APPEAL.]

MONAGHAN *v.* W. H. RHODES & SON.

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Master and Servant—Negligence—Compensation—Loading Ship—Stevedore—Defective Plant—Rope Ladder unattached at Bottom—Knowledge of Employer—"Volenti non fit injuria"—Statutory Duty of Shipowner to provide proper Means of Access to Hold of Ship—Docks, Harbours, and Canals, Loading, Unloading, and Coaling Order (1904—*No.* 1617), *Part II., reg.* 6.

The plaintiff, a dock labourer in the employment of the defendants, a firm of stevedores, was, with other servants of the defendants, working on the loading of a ship in a dock. During the loading the defendants' servants so blocked up the iron hold ladders that they could not be used, and in consequence some of them obtained from the ship a rope ladder which was fastened at the top to the coamings of the hatch and swung loose some feet from the bottom of the hold. The plaintiff was going up this ladder when it swung and caught his hand between the ladder and the coamings, and in trying to free himself he fell to the bottom of the hold and was seriously injured. There was evidence that after the rope ladder had been supplied the plaintiff complained to the defendants' foreman that the ladder was unsafe, and that one of the defendants himself came and saw the ladder in use and did not interfere.

The plaintiff based his claim (1.) on the ground that the defendants were guilty of statutory negligence under reg. 6 of Part II. of the Order of 1904, under s. 79 of the Factory and Workshop Act, 1901, and (2.) on common law negligence. Greer J. held that the claim on ground (1.) failed, as the statutory duty was imposed by the regulation upon the shipowners, and not on the defendants; and also failed on ground (2.) as the defendants were not guilty of such negligence as to make them liable to the plaintiff. On an appeal by the plaintiff on the second ground:—

Held, that when once it was ascertained that the original safe mode of access had gone, that another one of obvious danger had been substituted, and that the defendants had seen the obviously dangerous substitute and did not interfere, it followed that the defendants were negligent, and were therefore responsible to the plaintiff for the accident.

Griffiths v. *London and St. Katharine Docks Co.* (1884) 13 Q. B. D. 259 distinguished.

Decision of Greer J. on this point reversed.

Per Lord Sterndale M.R. The statutory duty under reg. 6 of the Order of 1904 of maintaining safe means of access by ladder or steps from the deck to the hold in which work is being done is imposed on the shipowner and not on the stevedore.

APPEAL by the plaintiff from the judgment of Greer J. in an action tried by him without a jury at the Liverpool assizes.

The plaintiff was a dock labourer in the employment of the defendants, who were a firm of stevedores. In December, 1918, he, together with other servants of the defendants, was engaged in loading the steamship *Thelma* at the Alexandra Docks, Liverpool. During the loading the defendants' men so blocked up the iron hold ladders of the ship with cargo that they could not be used, and some of them obtained from the ship a rope ladder, known as a Jacob's ladder. This rope ladder was fastened at the top to the coamings of the hatch and swung loose about four feet from the bottom of the hold. There was no other way provided for getting up from the hold.

On December 20, 1918, the plaintiff, who had completed his work, was ascending by means of the rope ladder when his left hand became jammed and crushed between the ladder and the coamings, with the result that on being liberated the rope ladder swung to one side and the plaintiff fell a considerable distance and sustained serious injuries.

The plaintiff brought the present action against the defendants for damages for personal injuries.

By his statement of claim he alleged that he had suffered damage from personal injuries by reason of the statutory negligence of the defendants in not providing proper and safe means of access to and egress from the hold of the ship where the plaintiff at the date of the accident was working; that the said process of loading the ship was by the Docks, Harbours, and Canals, Loading, Unloading, and Coaling Order (1904—No. 1617), made in pursuance of s. 79 of the Factory and Workshop Act, 1901, a "dangerous process," and that the plaintiff was a "person employed" in such dangerous process, and accordingly that the defendants were under reg. 6 of Part II. of such Order (1) guilty of statutory negligence. In his particulars of negligence he alleged (*a*) that the defendants did not on the said date provide and maintain safe means of access by ladder or steps from the deck to the hold of the said steamship *Thelma* in which work was then being carried on, with secure hand-hold and foot-hold, and that under clause (*b*) of reg. 6, and (*b*) that they did not in such process of loading stow the cargo sufficiently far from the iron ladder therein provided so as to leave sufficient room for the plaintiff to ascend in safety, but allowed the

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(1) Docks, Harbours, and Canals, Loading, Unloading, and Coaling Order (1904—No. 1617), Part II., reg. 6: "If the depth from the top of the coamings to the bottom of the hold exceeds six feet, there shall be maintained safe means of access by ladder or steps from the deck to the hold in which work is being carried on, with secure hand-hold and foot-hold continued to the top of the coamings.

"In particular such access shall not be deemed to be safe:—

"(*a*) Unless the ladders between the lower decks are in the same line as the ladder from the main deck, if the same is practicable having regard to the position of the lower hatchway or hatchways.

"(*b*) Unless the cargo is stowed sufficiently far from the ladder to leave at each rung of the ladder sufficient room for a man's feet.

"(*c*) If there is not room to pass between a winch and the coamings at the place where the ladder leaves the deck.

"(*d*) If the ladder is recessed under the deck more than is reasonably necessary to keep the ladder clear of the hatchway." (See Chitty on Statutes, 6th ed., vol. iv., p. 861.)

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same to become blocked by the said cargo and to be rendered dangerous and useless, and wrongfully and negligently, in breach of their statutory duty aforesaid, substituted for such ladder as was provided for by such regulation (1.) a rope ladder which was not secured at its lower end, but swayed and dangled at its bottom dangerously to the danger of the plaintiff and all other "persons employed" using the same, and also, as an alternative to such rope ladder, (2.) a sling attached to a winch by means whereof such "persons employed" might be drawn up from the said hold to the deck of the said steamship *Thelma.*

He further alleged that apart from such statutory negligence the defendants were guilty of negligence in providing and requiring the plaintiff to make use of such rope ladder, which, for the reasons mentioned, was defective and unsafe and unfit to be used for the purposes of ascent from or descent into the said hold; that the defendants were fully aware of the unfitness and danger of such rope ladder aforesaid, of which the plaintiff was ignorant, and which he only consented to use as an unavoidable alternative to ascending or descending by the more dangerous method of the said sling and winch also wrongfully and negligently provided by the defendants; and that such ascent and descent by either (1.) the said rope ladder and (2.) the said sling constituted a dangerous system, and the defendants were negligent in using or causing or requiring or allowing such system to be used by the plaintiff and other persons employed in loading the said ship.

The defendants by their defence denied that any statutory duty was thrown upon them as stevedores by reg. 6 in view of the provision in the regulations under the heading "Duties" that "it shall be the duty of the owner, master, or officer in charge of a ship to comply with Part II. of these Regulations." They also denied that the rope ladder was dangerous, or that they had been in any way negligent in the matter.

At the trial the plaintiff in the course of his evidence stated that he told the defendants' foreman that the ladder would not reach to the bottom of the hold, and that it was not safe, but that the foreman replied that it was the only one he had. One of the members of the defendants' firm admitted that he saw the ladder being used but did not interfere or stop its use as it did not strike him as being very dangerous. There was a considerable conflict of evidence whether a Jacob's ladder was generally used for this kind of work on board ship.

Greer J. held that reg. 6 of Part II. of the Order applied to the shipowners and not to the defendants, and that the plaintiff's action therefore failed on that point. He also held that the rope ladder was not a reasonably safe means of access from the hold, but that the defendants were not guilty of such negligence as to make them responsible to the plaintiff for the accident. He accordingly gave judgment for the defendants. But in order to avoid the necessity of the case having to go back to him in the event of the Court of Appeal holding that the defendants were liable, he assessed the damages at 600*l.*

The plaintiff appealed. The appeal was heard on November 21, 24, 1919.

Langdon K.C. and *J. W. Ross-Brown* for the appellant. Under reg. 6 of the Order of 1904 there is a statutory duty on the shipowner to maintain safe means of access by ladder or steps from the deck to the hold in which work is being done, but that does not exempt the employer from his common law duty. The employer's common law duty is to take reasonable care to provide proper appliances and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk: see per Lord Herschell in *Smith* v. *Baker & Sons.* (1) A Jacob's ladder was not, as was found by the learned judge, a safe means of access to the hold, and the defendants were negligent in allowing it to be so used. A stevedore is no doubt entitled to rely on the

(1) [1891] A. C. 325, 362.

warranty of the charterer or shipowner with reference to the ship's tackle, but that will not relieve him from liability to his servant in the case of an accident. A negligent system or a negligent mode of using perfectly sound machinery may make the employer liable: *Smith* v. *Baker & Sons.* (1) A stevedore owes a duty to his workman to take reasonable care in seeing that the tackle supplied by the ship is in a proper condition: *Biddle* v. *Hart.* (2) When once that duty is established the onus is on the employer to prove that servant agreed to undertake the risk: *Williams* v. *Birmingham Battery and Metal Co.* (3) Here there was no evidence that the plaintiff undertook the risk, and the fact that he knew of it is immaterial.

Greaves-Lord K.C. and *J. E. Singleton* for the respondents. Although the present appeal has to be considered apart from the question of statutory duty, the provisions of reg. 6 are important as showing not only that ladders were to be provided by the ship, but that the ship was to take care that such ladders were not blocked up. There was therefore a continuing duty in that respect. Not only is that so but the defendants were entitled to delegate the carrying out of the work to their foreman. Under the principle established by *Griffiths* v. *London and St. Katharine Docks Co.* (4) the workman cannot recover unless he proves that there was danger in the appliance used of which the master knew and the workman himself was ignorant. There is no qualification of that principle with regard to matters which arise after the commencement of the work. Here the defect arose from the means originally provided—namely, the iron hold ladders—having become defective by being blocked up. The conditions under which the rope ladder was here used are important. It is said that the plaintiff complained of the ladder to the foreman, but a jury might very well have found that it was not negligent in a member of the defendant's firm not to interfere when he saw the Jacob's ladder in use,

(1) [1891] A. C. 325, 339.

(2) [1907] 1 K. B. 649.

(3) [1899] 2 Q. B. 338.

(4) (1884) 12 Q. B. D. 493; (1884) 13 Q. B. D. 259.

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when the evidence is that he did not himself think it very dangerous, and found it being used by men experienced in this class of work.

[LORD STERNDALE M.R. referred to Beven on Negligence in Law, 3rd ed., vol. i., p. 641.]

Beven is there dealing with the doctrine of "volenti non fit injuria." Here the plaintiff chose to use the ladder with full knowledge that it was dangerous. A master is entitled to rely on the experience of his workmen, just as he is entitled to rely on an independent contractor: *Toronto Power Co.* v. *Paskwan.* (1) It is sufficient to satisfy the law if the employer makes a contract with an independent contractor for the supply of proper plant, provided that the contract is made with a reasonably competent contractor: *McInulty* v. *Primrose* (2); *Nelson* v *Scott Croall & Sons* (3); *Simpson* v. *Burrell & Son* (4); *Kiddle & Son* v. *Lovett.* (5) [They also referred to *Priestley* v. *Fowler* (6) and *Ogden* v. *Rummens.* (7)]

Langdon K.C. in reply referred to *Weblin* v. *Ballard.* (8)

LORD STERNDALE M.R. I have felt a little difficulty about this case, but on the whole I think the appeal should be allowed.

I can state the facts very shortly. The plaintiff was a workman in the employ of stevedores who were working on the loading of a ship called the *Thelma.* During the loading they so blocked up the iron hold ladders that they could not be used, and in consequence some of the stevedores' men—we do not know who—obtained from the ship a rope ladder which is called a Jacob's ladder, fastened at the top to the coamings of the hatch and swinging loose some feet from the bottom of the hold. So far as I can understand, for the purposes of this case a Jacob's ladder means a rope ladder swinging loose.

The plaintiff was going up this ladder. It swung, and his hand got caught between the ladder and the coamings, and,

(1) [1915] A. C. 734, 738.
(2) (1897) 24 R. 442.
(3) (1892) 29 S. L. R. 354.
(4) (1896) 33 S. L. R. 413.
(5) (1885) 16 Q. B. D. 605.
(6) (1837) 3 M. & W. 1.
(7) (1863) 3 F. & F. 751.
(8) (1886) 17 Q. B. D. 122.

in trying to free himself, he fell to the bottom of the hold and was seriously injured. That is all it is necessary to say about the facts except this: after this rope ladder had been supplied one of the defendant firm himself came and saw the ladder being used and did not interfere.

The action was in the first place founded on reg. 6 of the Order made under the Factory and Workshop Act, 1901, which provides that in certain circumstances, which apply to this case, "there shall be maintained safe means of access by ladder or steps from the deck to the hold in which work is being carried on, with secure hand-hold and foot-hold continued to the top of the coamings." And one of the conditions of its being considered to be safe is that the cargo shall be "stowed sufficiently far from the ladder to leave at each rung of the ladder sufficient room for a man's feet." That condition of things had been destroyed by the stowing of the cargo up against the iron ladder, so that there was no room for a man's feet.

The plaintiff first founded his cause of action on this, that the obligation was on the defendants to provide appliances and means of work, and this rope ladder was one of the things they had to supply, or, rather, that the means of access afforded at that time by this rope ladder was an appliance they had to supply. The judge thought that wrong, and I agree. The obligation under the Factory and Workshop Act is placed on the shipowner, and not on somebody doing work on the ship.

Therefore I think that part of the allegation of the plaintiff fails; but there is another, on which, I think, he is entitled to succeed—namely, that the defendants were negligent in allowing improper means of access to the hold of the ship to be used. In order to arrive at that I accept, as I am bound to do, the judge's finding that such a swinging ladder as this was not a reasonably safe means of access, and that it was a very dangerous thing for people to use. I do not think I have any right to do anything except take the judge's finding on the evidence before him in respect of that. There was evidence both ways. There was evidence that these rope ladders were never used for this kind of work on board ship; there was evidence that they were constantly used, and that they were the ordinary common thing to use, and that there was no danger. I do not think I have any right to speculate what I might myself think about the weight of the evidence on the one side or the other. The judge heard the witnesses, and decided that those who said this was an unusual and dangerous thing were right. It is quite true that witnesses of very considerable experience said this was the common thing to use, and there was no danger. The judge did not accept that, and I do not think I have any right to interfere with his finding.

That being so, it seems to be clear that the danger was obvious to anybody who saw what was being done, and as there was evidence by one of the defendant firm that he had seen this ladder in use, he must have seen, if he had exercised reasonable care, according to that finding of the judge, that it was dangerous. The learned judge, however, found that the defendants were not negligent, and this after having found that the ladder was a dangerous thing. Having found that they were not negligent, the judge, in my opinion, then went on, in the passage immediately following the finding, to explain the meaning of that finding. He said: "I think the employers and stevedores are bound to supply such hooks and slings and other articles that they usually supply for the purposes of the business; they are bound to supply them reasonably safe, but they are entitled, on the other hand, to assume that the owners of the ship will perform their duty under the statute and the regulations made thereunder, and if, when they send their men to work, they provide the usual and necessary tools, which are provided by the stevedore, it is no part of their duty to go to the ship to see that the ship is ready to perform its statutory duty. It is no part of their duty to see that the ship performs its duty, and the mere fact that an employer happened to go down and knew that this ladder was in use does not, in my judgment, make him responsible in law to his employees, who could themselves appreciate the danger just as much as he could himself.

He did not investigate the matter at all; he did what I suppose is done every day, he assumed that everything was all right, and that there was no occasion for him to interfere."

In my opinion these are the learned judge's grounds for the finding of no negligence, and they come to this: The defendants had a right to assume that the ship would perform its statutory duty of providing access to the hold; and the judge puts that as being the position when they sent their men to work. Now when the men were sent to work, the ladder was absolutely as it should be. It only became impracticable of use afterwards because something happened in the course of the loading, and the judge, with the greatest respect to him, seems to have overlooked the considerations that there was personal knowledge on the part of the defendants that the original state of things no longer existed, and that a substituted or emergency means of access had been installed which, according to the judge's finding, was obviously a dangerous one. He seems to have overlooked the question of whether, under these circumstances, the defendants were not negligent in making no protest and not interfering with what was obviously dangerous. I think that is where the judge went wrong. It seems to me that when once it was ascertained that the original safe mode of access had gone, that another one of obvious danger had been substituted, and that the defendants had seen that obviously dangerous substitute and did not interfere, it follows that the defendants were negligent.

It was said that the principle of *Griffiths* v. *London and St. Katharine Docks Co.* (1) applied, and that because the plaintiff knew of the danger, as is shown by his having remonstrated with the foreman about it, he could not recover. I do not think that principle applies at all to a case of this kind where the cause of action rests on personal negligence in the supervision of the employers, and I think, therefore, that the appeal must be allowed, and judgment be entered for the plaintiff for the amount found by the judge with costs here and below.

(1) 13 Q. B. D. 259.

ATKIN L.J. I agree. I start by assuming the common law duty of the employer to be as stated by Lord Herschell in *Smith* v. *Baker & Sons* (1)—namely, that it is the duty of the employer to take reasonable care to provide proper appliances and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk.

It may be that a state of things exists in the nature of the employment, such as that the appliances or part of them are provided by some person other than the employer. That does not relieve the employer of his common law duty, though it may very well be that he will not be responsible for a defect in the plant which may have arisen by the negligence of the actual owners of the appliances without his negligence, and a typical case of that sort is *Biddle* v. *Hart*. (2) There a man employed by a stevedore brought an action against his own employer by reason of the defects in the tackle for unloading a ship. The tackle was the property of the ship, usually provided by the ship, but it was in fact defective. On that state of facts the county court judge withdrew the case from the jury and non-suited the plaintiff, and his decision was upheld by the Divisional Court; but it was held by the Court of Appeal that that was wrong, because it was quite possible even in that state of things that the employer might himself be guilty of negligence. There Sir Gorell Barnes, after referring to s. 2 of the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), said: "What I take to be the meaning of that is that if the employer uses plant which does not belong to him, he may have a duty in regard to the persons employed to take reasonable care to see that it is proper for the purpose for which it is used. It may be that in a case of this character, although he had that duty, yet, if he had dealt with these shipowners before and had never had any cause for complaint, the jury might think that he had reasonably discharged that duty. On the other hand, when you have evidence that the plant was old and had been in use for a long time, the jury might say they were not satisfied that reasonable care had been taken to see that it was in a proper condition." So that the duty of the employer remains, although it may be that in a proper case he discharges that duty if the circumstances are such that he might reasonably be found to have relied on his previous experience of those persons who in fact supplied the appliances.

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(1) [1891] A. C. 325, 362.

(2) [1907] 1 K. B. 649, 653.

But in this particular case the employers were proved to have seen the appliance which the judge has found to be dangerous in use, and in these circumstances it appears to me that the negligence of the employers is established once you acquiesce, as I do, in the finding of the judge that the use of the ladder in the circumstances in which it was used was a dangerous use.

The only other point taken is that the man must have known and appreciated the danger equally with the employers, and that he cannot therefore recover. That is the point of *Griffiths* v. *London and St. Katharine Docks Co.* (1) But I think that it is really disposed of as far as we are concerned by the decision in *Williams* v. *Birmingham Battery and Metal Co.* (2) That was an action brought at common law in the sense that, although it was brought under Lord Campbell's Act, the duty on the employer would be identical with that at common law. In that case the plaintiff, the servant, complained that the employers had not provided reasonable means of access for enabling him to ascend to or descend from an elevated tramway on which he had to work. The jury found that there was a danger, and that the deceased had the same means of knowing it was dangerous as the defendant, and did know it was dangerous. On that the judge entered judgment for the defendant. But the Court of Appeal set aside that judgment, and entered judgment for the plaintiff. That case raised this very point at common law, and it was held there that, once you had established a duty on the employer, the employer must, in order to escape that liability, establish that the servant had contracted to take on himself the risk dispensing with the precautions which might be taken to obviate it, and it was decided that the question of whether or not the servant had undertaken that risk was a question of fact to be decided on the circumstances of each case. There Romer L.J. said: "In considering such a question the circumstance that the servant has entered into, or continued in his employment, with knowledge of the risk and of the absence of precautions is important, but not necessarily conclusive, against him"; and all the members of the Court of Appeal discussed the matter on the footing that the maxim "Volenti non fit injuria" did not apply, because the defendants there had never raised the point or asked the jury to find that the workman had taken upon himself the risk.

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(1) 13 Q. B. D. 259.

(2) [1899] 2 Q. B. 338, 345.

To my mind that decision is binding on us, and, that being the case, there appears to me to be no sufficient evidence that the workman here undertook the risk of this dangerous ladder. If that is so, his knowledge of the risk is immaterial. It appears to me therefore that, there being a breach of duty on the part of the employers which in fact caused damage to the plaintiff, the plaintiff is entitled to recover, and judgment should be entered for him.

YOUNGER L.J.: I concur.

Appeal allowed.

Solicitors: *Attenborough & Son, for R. Barrow Sicree, Liverpool; Finch, Jennings & Tree, for Syers, Dixon & Barrell, Liverpool.*

W. I. C.

[IN THE COURT OF APPEAL.]

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COWAN *v.* SEYMOUR (SURVEYOR OF TAXES).

Revenue—Income Tax—Office or Employment of Profit—Winding up of Company—Present by Shareholders to unpaid Secretary and Liquidator—Perquisite or Profit accruing by Reason of Office—Income Tax Act, 1842 (5 *&* 6 *Vict. c.* 35), *s.* 146, *Sched. E—Income Tax Act,* 1853 (16 *&* 17 *Vict. c.* 34), *s.* 2, *Sched. E.*

The appellant acted as secretary of a company without remuneration from the date of its incorporation in January, 1912, and when the company was wound up voluntarily in September, 1916, he was appointed liquidator for the purpose of the winding up, and he acted in that capacity also without remuneration. A final general meeting of the company was held in November, 1916, for the purpose of having an account of the winding up laid before the members of the company. It appeared that there was a sum in hand amounting to 1172*l.*, which was divisible amongst the ordinary shareholders of the company. A resolution was passed at that meeting, which was assented to by all the shareholders of the company, that the chairman and the appellant be asked each to accept a moiety of the balance, and that the best thanks of the shareholders were due and were tendered to them for the services they had rendered to the company throughout its existence and during the winding up. The appellant received a moiety of the balance amounting to the sum of 586*l.* The appellant having been assessed to income tax in respect of that sum appealed. The Commissioners of Income Tax held that he was the holder of an office or employment of profit within the meaning of s. 146, Sched. E, r. 3, of the Income Tax Act, 1842, and they accordingly confirmed the assessment. On appeal, on a case stated by the Commissioners, Rowlatt J. affirmed the decision. On appeal :—

Held, that in order to constitute a voluntary payment a profit accruing by reason of an office within Sched. E it was not necessary that the office previously to the payment being made should have been an office of profit and that there might well be a payment in respect of an office which had been gratuitous up to its termination such as to be a profit by reason of the office.

Held also (by Lord Sterndale M.R. and Younger L.J., Atkin L.J. dissenting), that the Court ought to deal with the appeal on the facts as stated in the case, and ought not to speculate as to whether there might not be something in the relations of the parties and of the company with other companies which might throw a different light on the transactions; that on the facts as stated, having regard to the important factor that the office had terminated when the payment was made, and to the almost equally important factor that the payment was made, not by the company, but by other persons, the proper and only inference that could be drawn was that the money was paid to the appellant after his office had terminated as a tribute or testimonial for his services in the past, and not as a payment for those services; and that he was therefore not assessable to income tax in respect of it.

Decision of Rowlatt J. [1919] 2 K. B. 146 reversed.

APPEAL by the plaintiff from a decision of Rowlatt J. on a case stated by the Commissioners of Income Tax on Public Offices or Employments of Profit in the City of London. (1)

At a meeting of the Commissioners held on December 17, 1917, the appellant, Charles John Cowan, appealed against an assessment to income tax raised upon him in the sum of 586*l.* 8*s.* 4*d.* under the provisions of s. 2, Sched. E, and s. 5 of the Act of 16 & 17 Vict. c. 34, in respect of the year ending April 5, 1917, received by him as secretary and liquidator of the New Zealand and Federal Co., Ld.

The New Zealand and Federal Co., Ld. (hereinafter called "the company"), was duly incorporated under the Companies (Consolidation) Act, 1908, on January 2, 1912, with a registered office situate at No. 138, Leadenhall Street, in the City of London.

The applicant acted as secretary of the company without remuneration from the date of its incorporation until his appointment as liquidator of the company by the resolution next hereinafter mentioned.

At an extraordinary general meeting of the company held on September 19, 1916, the following resolution was passed: "That the company be wound up voluntarily and that Charles John Cowan, of No. 138 Leadenhall Street, London, E.C., shall be and he is hereby appointed liquidator for the purpose of such winding up."

The appellant gave evidence that until the passing of the resolution of November 29, 1916, next hereinafter mentioned, he gave his services as secretary and liquidator gratuitously, and that until the passing of that resolution he did not receive or agree to receive anything from or in respect of the company.

An extraordinary general meeting of the company was duly held on November 29, 1916, for the purpose of having an account of the winding up laid before the members of the company pursuant to s. 195 of the Companies (Consolidation)

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(1) [1919] 2 K. B. 146.

Act, 1908, showing the manner in which the winding up had been conducted and the property of the company disposed of, and of determining by extraordinary resolution the manner in which the books, accounts and documents of the company, and of the liquidator, should be disposed of.

The minutes of the meeting, after reciting that Mr. Warrington Laing had acted as chairman and the appellant as secretary and liquidator of the company since its inception without remuneration for their services, and that, as appeared by the accounts, after meeting all claims there was a sum in hand equal to 6.86*d.* per share, which according to the company's memorandum of association was divisible amongst the ordinary shareholders of the company, record that the following resolution was passed: "That subject to the assent of each ordinary shareholder in respect of the share payable to him, Mr. Warrington Laing, the chairman, and Mr. C. J. Cowan, the late secretary, be each asked to accept a moiety of such balance, and further, that the best thanks of the shareholders are due and are hereby tendered to Mr. Laing and Mr. Cowan for the services they have rendered to the company throughout its existence and during the winding up of the same."

The resolution was signed or initialled by all the shareholders of the company.

The appellant received a moiety of such balance amounting to the sum of 586*l.* 8*s.* 4*d.* above mentioned, which was paid to him during the year ending April 5, 1917—namely, on December 6, 1916.

The return of the final winding-up meeting of the company was registered on November 30, 1916.

The appellant contended (*a*) that he did not hold any office or employment of profit under the company within the meaning of r. 3 of s. 146 of 5 & 6 Vict. c. 35 (1); (*b*) that the sum given to him by the shareholders was a purely voluntary gift, and by reason of clause 6 of the memorandum of associa-

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(1) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 146: "The duties hereby granted, contained in the Schedule marked (E) shall be assessed and charged under the following rules, which rules shall be deemed and construed a part of this Act, and to refer to the said last-mentioned

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tion and clause 95 of the articles of association and s. 186 of the Companies (Consolidation) Act, 1908, could not be other than a voluntary gift; (*c*) that the whole of the duties of the appellant as secretary and liquidator of the company had terminated before the gift was made or offered; and (*d*) that the payment was at most a payment of capital by way of a retiring bonus after the services had terminated, and not a salary for the purposes of taxation.

It was contended on behalf of the surveyor of taxes (inter alia) (*a*) that the terms of the resolution of November 29, 1916, clearly showed that the payment was made for services rendered to the company as secretary and as liquidator; (*b*) that directly a payment was made the office held by the appellant became an office or employment of profit within the meaning of the above-named sections, and that as, if the services had not been rendered, the payment would not have been made, such payment accrued to the appellant in virtue of his office or employment, and was properly assessable under the provisions of the Income Tax Acts.

The Commissioners were of opinion that the appellant was the holder of an office or employment of profit within the meaning of r. 3 of s. 146 of the Act 5 & 6 Vict. c. 35, and they accordingly confirmed the assessment.

Rowlatt J. held that as the resolution of the shareholders giving the money to the appellant was passed at the final general meeting of the company and the payment was made in recognition of the services rendered by the appellant to the

duties, as if the same had been inserted under a special enactment.

"Schedule (E).

"*Rules for charging the said Duties.*

"First.—The said duties shall be annually charged on the persons respectively having, using, or exercising the offices or employments of profit mentioned in the said Schedule (E), or to whom the annuities, pensions, or stipends mentioned in the same Schedule shall be payable, for all salaries, fees, wages, perquisites, or profits whatsoever accruing by reason of such offices, employments, or pensions. . . .

"Third.—The said duties shall be paid on all public offices and employments of profit of the description hereinafter mentioned within Great Britain; (videlicet) . . . . any office or employment of profit held under any ecclesiastical body, whether aggregate or sole, or under any public corporation, or under any company or society, whether corporate or not corporate . . . ."

company as secretary and liquidator, the money accrued to the appellant by reason of his office, which thereupon became an office or employment of profit within the meaning of the first rule contained in s. 146 of the Income Tax Act, 1842, for charging duties under Sched. E, and the appellant was therefore liable to pay income tax under Sched. E upon that sum.

The appellant appealed.

Edwardes Jones for the appellant. Where there is an office of profit a voluntary gift to the holder received by him in virtue of his office is assessable to income tax; but an office of profit does not exist where there is no right to any emolument. An office of profit connotes the right to exercise a duty and to receive an emolument: Dowell's Income Tax Acts, 8th ed., pp. 570 et seq.; Blackstone's Commentaries (Kerr), ed. 1857, vol. ii., p. 36, where "offices" are defined; *Heartley* v. *Banks* (1); *Delane* v. *Hillcoat.* (2)

A liquidator is no doubt the holder of an office, but not when he has ceased to have any duty to perform: Palmer's Company Precedents, 11th ed., pt. II., p. 904. In *Hutton* v. *West Cork Ry. Co.* (3), where a company had transferred its undertaking to another company, and was being wound up, it was held that a resolution, whereby gratuities were voted to directors and servants of the company was invalid, inasmuch as the company was no longer a going concern, and only existed for the purpose of winding up: see also *Duncan's Trustees* v. *Inland Revenue Commissioners* (4); *Poynting* v. *Faulkner* (5); *Smyth* v. *Stretton.* (6) A mere donation made to the holder of an office after the termination of that office, which has never been an office of profit, is not assessable under Sched. E. In *Poynting* v. *Faulkner* (5) the tests are laid down by Collins M.R.

In *Blakiston* v. *Cooper* (7) Easter offerings to the clergy were held to be assessable; but the ground of that decision was that there was a continuity of annual payments apart from any special occasion or purpose. Here there is only a single gift on a single occasion, and it is not given to the recipient in virtue of his office. There is in this case no office of profit in existence.

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(1) (1858) 5 C. B. (N. S.) 40, 55.
(2) (1829) 9 B. & C. 310, 313.
(3) (1883) 23 Ch. D. 654.
(4) 1909 S. C. 1212.
(5) (1905) 5 Tax Cas. 145.
(6) (1904) 5 Tax Cas. 36.
(7) [1909] A. C. 104.

T. H. Parr (*Sir Ernest Pollock S.-G.* and *R. P. Hills* with him) for the Crown. This money accrued to the appellant in virtue of his having held the office of secretary and liquidator. The Commissioners have held that it accrued to the appellant, by virtue of the office which he had held, and the resolution itself was evidence upon which they might properly come to that conclusion. It is said that there cannot be an office or employment of profit where no salary is paid but a subsequent gift is made to the holder of the office. That contention is negatived by *Herbert* v. *McQuade* (1), where grants to beneficed clergy out of the Queen Victoria Clergy Sustentation Fund were held to be "payments or profits accruing by reason of his office" within s. 146, r. 1, of the Income Tax Act, 1842. It was there laid down by Collins M.R. that a payment may be liable to income tax although it is voluntary on the part of the persons who made it, and that the test is whether, from the standpoint of the person who receives it, it accrues to him in virtue of his office.

This is clearly an "office of profit." An office of profit means an office in respect of which a profit may accrue. As soon as a donation is given it relates back and the office becomes an "office or employment of profit." This money was voted to the appellant in respect of services rendered by him in his offices of secretary and liquidator. It does not matter that he had not hitherto received any salary or emolument. The true test is whether the appellant would have received the gift if he had not filled the office of secretary or liquidator, in other words, whether the profit accrued to him by virtue of his office. The test cannot be whether the office is at an end. The kind of voluntary payments which are not taxable are epitomised in the judgment of Lord Loreburn L.C. in *Blakiston* v. *Cooper*. (2) This is not a mere present, but a payment for services rendered.

(1) [1902] 2 K. B. 631, 649.

(2) [1909] A. C. 104, 107.

Edwardes Jones in reply. The terms of the resolution under which the money was voted go to show that there was no idea of payment for services rendered, but a mere gift was intended. The payment, if anything at all, was a perquisite, a thing which happens once: see Les Termes de la Ley, ed. 1721, p. 476, "Perquisite"; 7 Geo. 1, st. 1, c. 27, s. 29; 31 Geo. 2, c. 22, ss. 1, 3; 39 Geo. 3, Sched., case 15. It was a mere distribution of capital and not an annual profit. The whole scheme of the Income Tax Acts is to tax annual profits. *Tennant* v. *Smith* (1) shows that there must be some sort of agreement before you can get a perquisite or profit. A mere chance payment is not taxable.

LORD STERNDALE M.R. A great many difficulties have been raised during the argument in this case which to my mind have nothing to do with the point we have to decide, but the only difficulty I have lately felt is whether we are in a position to deal with the question before us on the case as it stands or whether we ought to send it back to the Commissioners with a direction.

The question arises in these circumstances. The appellant was the secretary of the New Zealand and Federal Co., Ld., and had acted as secretary ever since its incorporation in 1912, without remuneration, and another gentleman had acted as chairman, also without remuneration. We were told during the argument that the company was a subsidiary company, and that there were a great many other companies with which these gentlemen were concerned, and for which they very probably received remuneration. With that we have nothing to do, because it does not appear upon the facts of the case as stated. Certainly if we had to inquire into all these matters it is quite possible that the result might not be to better the appellant's case. We must, however, deal with the question on the facts as stated in the case before us.

The company, in September, 1916, passed a resolution to wind up voluntarily, and appointed the appellant liquidator. He gave his services also as liquidator gratuitously. In

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(1) [1892] A. C. 150, 155.

November, 1916, an extraordinary general meeting of the company was held for the purpose of having an account of the winding up laid before the members of the company under s. 195 of the Companies (Consolidation) Act, 1908, showing the manner in which the winding up had been conducted. [His Lordship read the minutes of the meeting of November, 1916, above set out, and continued:] The half of that balance which was paid to the appellant was a sum of 586*l*. 8*s*. 4*d*.

At that time, for all practical purposes, the employment of the appellant was at an end. It is quite true that he was not absolutely discharged from his office as liquidator, because there were some formal matters which had still to be dealt with, but it may be taken, I think, that his office was at an end. Certainly the office or employment of the chairman was at an end, and had been at an end for some time.

The question is whether that sum paid to the appellant is a sum which is taxable under the Income Tax Act, 1853, s. 2, Sched. E. That schedule provides for taxation "For and in respect of every public office or employment of profit, and upon every annuity, pension, or stipend payable by Her Majesty. . . . ." The rules for charging the duties under that schedule are to be found in Sched. E to s. 146 of the Income Tax Act, 1842. Rule 1 provides, "The said duties shall be annually charged on the persons respectively having, using, or exercising the offices or employments of profit mentioned in the said Schedule E, or to whom the annuities, pensions or stipends mentioned in the same schedule shall be payable, for all salaries, fees, wages, perquisites, or profits whatsoever accruing by reason of such offices, employments, or pensions . . . ." It is now well settled that a voluntary payment, if it accrues to a person by reason of an office or employment held by him, is a profit within the meaning of the schedule, It might have been argued, and I believe was argued by the appellant in the present case, that "all profits whatsoever" must be of the same nature as salaries, fees, wages and perquisites, and therefore that a voluntary gift was not within it at all. That contention, as I say, cannot be maintained

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now; it has been quite clearly decided that a voluntary payment or a gift, call it which you will, can be a profit and is a profit if it accrues by reason of the office, and it was not, and could not be otherwise contended in this case. But as I understood the contention it was said that there must be an office of profit before a voluntary payment could be a profit of that office, and at first I certainly took that argument not to be confined to a time after the office had terminated, but to extend to the whole term of the existence of the office. It seems to me that that contention could not possibly be maintained, and for this reason. As soon as one arrives at the fact that a voluntary payment accruing by reason of an office is a profit of the office, one has an office of profit. I am speaking now of a payment during the continuance of the office. Take the case of the appellant. Suppose during the first or second year of his gratuitous services the company had passed a resolution to pay him a certain sum of money for his services—it is immaterial for the present purpose whether that would have been an ultra vires resolution or not; possibly it would have been—but suppose such a resolution as that had been passed and such a payment had been made, it seems to me it would have been impossible to say, "This man was receiving nothing before, his office was not an office of profit before; and this is a voluntary gift, therefore it cannot be a profit of his office." It seems to me that it would certainly be a profit accruing to him by virtue of his office, and that as soon as one gets a profit of the office, one gets an office of profit. This may sound like arguing in a circle, and possibly it is, but that is because of the language of the statute. Therefore that broad proposition cannot, as it seems to me, possibly be maintained.

But to-day I think the argument for the appellant was rather narrowed to this, that a voluntary payment cannot be a profit of an office after that office has terminated, unless the office had previously been an office of profit. Now I cannot accept that as a broad proposition. It seems to me that there may very well be a payment in respect of an office which has been gratuitous up to its end, which still may be a payment for the services of that office, and therefore a profit accruing by reason of the office. I do not think that hard and fast line can be drawn. But of course the fact that the office has terminated is a matter of very great importance. It is stated, I think, even as broadly as the proposition contended for by the Lord President (Lord Dunedin) in *Duncan's Trustees* v. *Inland Revenue Commissioners.* (1) He there says: "I confess I have never been able to see how it could possibly be said to be in respect of his office, when the whole reason it was given to him was that he was no longer in the office." At first sight that may seem to bear out the proposition that was contended for. I do not think it does because it will be seen that the noble and learned Lord was speaking with reference to the facts of that case, which was one of an annuity granted to a Minister of the Church of Scotland on retirement through ill-health, and therefore given to him as a compassionate allowance, which could not be obtained except when he had resigned his cure. Therefore I do not think that that proposition can be maintained. But the fact in this case that the office was at an end is a fact of very great weight, and when you add to it that the payment was made, not by the employer, the company, but by other persons—namely, the shareholders individually—the facts still more point to it not being a payment for services or a profit accruing by reason of the office. In this case, as I said, the appellant's office was at an end; it had been a gratuitous office; no payment could be made to him by the company, and what happened was that the shareholders of the company, which was, I understand, a private company, amongst whom the money was divisible, passed a resolution thanking the chairman and the appellant for the services they had rendered throughout its existence and during its winding up, and prefacing those thanks by asking them to accept a moiety of the balance. To my mind that points to this not being a payment in respect of services rendered, but being something in the nature of what is referred to by Lord Loreburn in *Blakiston* v. *Cooper* (2), where he says: "In my opinion where a sum of money is given to an incumbent substantially in respect of his services as incumbent, it accrues to him by reason of his office. Here the sum of money was given in respect of those services. Had it been a gift of an exceptional kind, such as a testimonial, or a contribution for a specific purpose, as to provide for a holiday, or a subscription peculiarly due to the personal qualities of the particular clergyman, it might not have been a voluntary payment for services, but a mere present."

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(1) 1909 S. C. 1212, 1215.

(2) [1909] A. C. 104, 107.

In the present case I should certainly say that on the undisputed facts of the case the payment was not a payment for services rendered in the true sense, nor a profit which accrued to the appellant by reason of his office, but was very much more in the nature of a testimonial to him for what he had done in the past while his office, which had then terminated, was in existence. But the difficulty I have felt is whether this is not really a question of fact upon which the Commissioners either have found or ought to find, and whether the case ought not to go back to them to determine. Although no doubt the Commissioners have found that the appellant was the holder of an office or employment of profit, they have not found whether this sum was given to him by the shareholders as a purely voluntary gift, and they have not found what is the result of the whole of the duties of the appellant as secretary having terminated. But, although with great doubt, I have come to the conclusion that I ought to deal with the facts, and that the facts are sufficiently stated for me to do so. I think I must take the case stated as containing the whole of the facts and have regard to nothing else, and that the Court ought not to speculate as to whether there might not be something in the relations of these parties and this company with other companies which might throw a different light upon the transaction. Looking at those facts as so stated I find, as I have said, the very important factor of the office having terminated, and the other almost equally important factor that the payment was made, not by the employer but by other persons, though in this case perhaps that is not quite so important as there is a close connection between the employer, the company, and the persons who gave the money; the inference therefore is that this was money paid to the appellant as a testimonial or tribute for what he had done after his services were over and not a payment for those services. And I think on the facts as they stand that the direction should have been given that it was an inference of fact which must be drawn. That being so I think I am entitled to say that if that is to be, as it is, a question of fact, on the facts as stated only one inference could be drawn, and therefore the appeal ought to succeed with costs here and below.

ATKIN L.J. I am entirely in accord with what the Master of the Rolls has said on the law applicable to this case and as to the construction of the Act of Parliament. It was contended that for the purpose of determining whether the duty could be charged under rule 1 what you first of all had to see was whether or not, before the profit sought to be charged accrued, the office or employment in respect of which the person receiving it assessed was an office or employment of profit, and that unless you could predicate that it was an "office or employment of profit" which apparently was to be determined quite apart from the question whether the profit in question accrued to the holder by reason of it, then the person exercising it was not chargeable even though in fact he derived a profit from it. That, to my mind, is not the right construction of this Act. In my view if a profit does accrue to the holder of an office or employment by reason of his office or employment, such office or employment is an office or employment of profit, and it becomes unnecessary therefore to consider in the present case the question of whether on the true construction of Sched. E, the words "of profit" qualify office as well as employment, because in either case the result is the same.

I agree also that it is not conclusive against a profit accruing to the holder by reason of his office that the office has terminated at the time he in fact received the alleged profit. It was I think quite rightly conceded by counsel for the appellant that there might be such a case as, for instance, the case of Easter offerings, where an incumbent might have vacated his incumbency and yet voluntary gifts are made to him after he had vacated his incumbency by reason of his office. It is quite plain that there is nothing which prevents a voluntary payment from being a possible profit of an office. That, if it is necessary, is made plain, I think, in terms by the judgment of Collins M.R. in *Herbert* v. *McQuade*. (1) He there says that the principle of law is "that a payment may be liable to income tax although it is voluntary on the part of the persons who made it, and that the test is whether, from the standpoint of the person who receives it, it accrues to him in virtue of his office; if it does, it does not matter whether it was voluntary or whether it was compulsory on the part of the persons who paid it. That seems to me to be the test; and if we once get to this—that the money has come to, or accrued to, a person by virtue of his office—it seems to me that the liability to income tax is not negatived merely by reason of the fact that there was no legal obligation on the part of the persons who contributed the money to pay it." Therefore the question that arises in this case is the question that was thus summarised by Lord Loreburn in *Blakiston* v. *Cooper* (2): "In my opinion, where a sum of money is given to an incumbent substantially in respect of his services as incumbent, it accrues to him by reason of his office." So I should say the question here is whether if a sum of money is given to the secretary or liquidator substantially in respect of his services as secretary or liquidator, it accrues to him by reason of his office. The question therefore in this case is whether this payment was made to the appellant in respect of his services as secretary or liquidator.

Now is that a question of fact, or a question of law? Of course it may very well be that the facts might throw the case so clearly on one side of the line or the other that there could be only one proper view to be taken of it. In that case I think it would be rightly said that there was evidence upon which the tribunal of fact could not come to the opposite conclusion. But on the other hand if there is evidence upon which the tribunal of fact could come to a conclusion either way, then it appears to me that they are the persons to determine the question, because I think one thing is quite plain, that the function of this Court is to determine questions of law; and that it is only questions of law that the taxpayer can raise on appeal from the Commissioners.

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(1) [1902] 2 K. B. 631, 649.

(2) [1909] A. C. 104, 107.

Now the facts of this case were that the company had been in existence some four and three-quarter years—nearly five years. It was incorporated in 1912; it was wound up in September, 1916, and the final resolution was passed on November 29, 1916. The appellant had served both as secretary and as liquidator without remuneration, and I think also it has to be noted that his duties as liquidator had not ceased and did not cease at the meeting of November 29, 1916, because one of the objects for which that meeting was held was to determine "the manner in which the books, accounts and documents of the company, and of the liquidator, should be disposed of," and until the books of the liquidator had been disposed of his duties as liquidator had not ceased. Whether the payment was granted to him substantially in respect of his services I think is a question which would be relevant to the resolution of November 29, 1916. [His Lordship referred to the terms of the resolution, and continued:] I think myself that it was open to the tribunal of fact to associate with the thanks which clearly were given to the appellant for his services the more substantial acknowledgment which at the same time was recorded in the first part of the resolution, and I think that there was evidence upon which the tribunal of fact might have come to the conclusion that not only thanks but also money was being accorded to the chairman and secretary in respect of the services which are expressly mentioned. Then when I consider that the persons who voted the sum of money are persons upon whom would fall in fact the incidence of a payment for remuneration if it had been made—namely, the shareholders—and then when I take into account the fact that the sum after all is not an

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insignificant one, but a sum of 586*l.*, and that if it had been an annual payment it would have represented a sum of something like 120*l.* per annum during the time that the appellant had performed these services, I think that also is a relevant fact on the question whether or not this sum was voted substantially in respect of the services of the appellant as secretary and liquidator. Therefore if I had to determine the question myself I think I should have said that there was evidence before the Commissioners, and on the facts found upon which they could have found that this sum of money was voted to the appellant substantially in respect of his services as secretary and liquidator. I do not think that the Commissioners have in fact found either way. It seems to me that they were so interested in the point which was apparently put before them that you have first of all to find that this was not an office of profit at all, that they confined their attention to finding that fact, and they held, and, as I think we are all of opinion rightly so, that the appellant was the holder of an office of profit. I do not think that necessarily involved their finding that this sum accrued to him by reason of his office, though it may very well be argued that it did. But at any rate their finding is ambiguous, and I myself should have been in favour of sending the case back to the Commissioners for the express purpose of finding whether in their opinion this money was substantially paid to the applicant in respect of his services as secretary and liquidator. But my brothers are of opinion that the right view is that there is no evidence upon which they could so find, and in that view, therefore, the appeal must be allowed.

Younger L.J. Logically the first objection to this Court entertaining the appeal is that it turns on a question of fact which has been determined by the Commissioners with evidence before them upon which they might have found as they did, and that the case accordingly is not one for the interference of the Court.

Now the Commissioners have not, I think, here set themselves to determine any question of fact upon which there is room for two conclusions. What they have done is to decide that the office of the appellant has become an office of profit within the meaning of the Act because, and because only, after he had left it or at the moment of his demitting it he has received this sum of money. The Commissioners have not, in my view, expressed any opinion on the question of fact—I doubt whether they have even considered it—whether or not this payment was made to the appellant as a mere gift or gratuity or testimonial on relinquishment of some office. And if the taxability of the payment depends, as the authorities appear to show that it does, not only on the terms and circumstances in which it was paid, but on the character in which it was received—and for that the authority of *Herbert* v. *McQuade* (1), in the passage which Atkin L.J. has read, is clear—there has, by the Commissioners, been no relevant finding at all: and this Court should, I think, the facts being fully stated, and not being in dispute, determine their true effect for itself, as, indeed, the learned judge has himself set out to do in the judgment under appeal.

Now I agree in thinking that the question which has to be answered is whether this payment, not being a salary, or a fee, or wages, or, as I think, a perquisite, is a profit of some kind accruing to the appellant by reason of an office of profit within the meaning of r. 1 to s. 146 of the Act of 1842 for the assessment of duties under Sched. E. And I first ask myself this question: What is the office in respect of which this so-called profit accrued? The learned judge has assumed throughout his judgment and has dealt with the case as if the office were that of liquidator of this company. So to deal with the question certainly simplifies the problem in hand, but it alters the real problem and the facts do not justify that alteration. The appellant had held two offices under this company—that of secretary and that of liquidator. By the resolution offering the sum to him he is asked to accept it under the description of the "late secretary." His position as liquidator is not in any way referred to in the

(1) [1902] 2 K. B. 631, 649.

effective resolution: although it is true his office as such is coupled with his office of secretary in the preamble, where it describes the positions with the company which he had filled. Strictly therefore if this so-called profit accrued to him by reason of an office at all it is "the late office" of secretary by reason of which it accrued. On a broader construction it is by reason of both offices—secretary and liquidator—that it accrued; but by no possible construction is it only by reason of his office of liquidator. This at once introduces two difficulties. The office of secretary had ceased three months before the payment, and the considerations applicable to a receipt so long afterwards may be very different from those affecting the receipt of money by the appellant as liquidator while that office was still technically in existence. But, further, the point is here of substantive importance because there is no appropriation of payments between the two offices: there is now no possibility of appropriation between the two offices: and this fact goes, as I think in this case, some part of the way to show that in no true sense was this a profit accruing by reason of any office at all. And in the same connection it is to be observed, as has already been pointed out by the Master of the Rolls, that this payment was not made by the natural paymaster, the company, under which the so-called office of profit was held, and moreover it is, as I think, notwithstanding Mr. Edwardes Jones' argument, clearly not a perquisite which might very naturally be paid by someone else. That circumstance is, of course, not in any way conclusive at least in connection with an office still held, for which I would refer to the observations in *Herbert* v. *McQuade*(1) already read by Atkin L.J. But it may be a very relevant circumstance, and when it is remembered that this payment, if made by the company, the natural paymaster at the time when it was made, would have been ultra vires and illegal, and that the payment can only be justified as one by the individual contributories out of their own moneys, the circumstance lends further weight to the view that this was not a profit by reason of the office at all, but was really a gift by persons in the position of beneficiaries who had appreciated and it may be had benefited by the personal exertions of the holder of the office while he held it. A gift by beneficiaries to a gratuitous trustee who is prohibited in equity from deriving any profit from his trust could not, I think, with any show of propriety, be described as a profit accruing to a trustee by reason of his trust. Can this payment with any greater appropriateness be so described ? I think not.

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(1) [1902] 2 K. B. 631, 649.

But further, to look at the point from another aspect, the payment was made by these beneficiaries after the office had ceased, or, at the very least, when the duties attaching to it had been in substance all performed, at a moment, therefore, when no further service was contemplated or possible, at a moment also when no right to claim it or any part of it had accrued. Furthermore, it is expressed to be made in words of gift : the recipient is asked whether he will accept it : in terms it is a testimonial of gratitude for past services, personal too in character, as is shown by the fact that there is an equal division of the fund between two gentlemen whose offices under the company were so diverse in prominence and responsibility as that of chairman and secretary and liquidator; being prompted further in the case of the chairman, if the expression of gratitude in the resolution is to be looked at, by his services during the winding up when, of course, as chairman, he had no duties to perform, his office having ceased to exist at its commencement.

All these circumstances appear to me to show how impossible it is to bring the facts of this case, when they are fully regarded, within the terms of this section as expounded by Stirling L.J. in *Herbert* v. *McQuade* (1), the case already cited. There the Lord Justice says: " I think that a profit accrues by reason of an office when it comes to the holder of an office as such—in that capacity—and without the fulfilment of any further or other condition on his part." Here as it appears to me the personality of the appellant, and I may say also the personality of the chairman, were everything; their office or offices as such, whatever

(1) 2 K. B. 631, 650.

they were, were relatively nothing. They may have been the causa sine qua non, but they were not the causa causans.

I have now gone through, I think, all the facts for the purpose of enabling myself to answer these questions which I have transcribed as being put by different judges in dealing with a case of this kind: First, was this payment, at the very highest, more than a gratuity to this gentleman on his ceasing to hold an office? That is the way it was put by Channell J. in *Smyth* v. *Stretton* (1): or secondly, was it a gift to this gentleman after he had left his office or at the moment of his leaving it, if I may so paraphrase the question of Collins M.R., in *Poynting* v. *Faulkner* (2): or thirdly, was it a "testimonial" in Lord Loreburn's language in *Blakiston* v. *Cooper*: or lastly (3), was this a freewill gift to the recipient, so made and so received, to use Lord Ashbourne's test in the same case.

For myself I unhesitatingly answer the first of these queries in the negative and all the others in the affirmative, and in that view it becomes unnecessary for me to consider the only question which apparently the Commissioners decided —namely, whether the receipt of this money made this office an office of profit within the meaning of the Act. Even if the appellant here had held an office which was ab initio an office of profit within the meaning of the Act, my opinion would still be that the particular payment here in question was not a profit which accrued to the appellant in respect of that office.

For in my judgment the fundamental question in these cases must always be the same. Has the sum in question accrued as a profit by reason of an office? If it has not, then it is not chargeable to income tax under Sched. E even if the office be indubitably an office of profit in respect of other emoluments. If on the other hand the sum in question has accrued as a profit by reason of an office, then the office, although up to that moment gratuitous, becomes ex necessitate rei, and in respect of that receipt an office of profit,

(1) 5 Tax Cas. 36, 41.

(2) 93 L. T. 367, 370; 5 Tax Cas. 145.

(3) [1909] A. C. 104, 107.

the holder of which is chargeable under the schedule in respect of the profit which has accrued to him.

Appeal allowed.

Solicitors for appellant: *Thomas Eggar & Co.*
Solicitor for respondent: *The Solicitor of Inland Revenue.*

W. I. C.

MITTELMANN AND ANOTHER *v.* DENMAN.

1919
Dec. 8.

Justices—Practice—Summary Offence—Plea of Guilty—Right of Appeal to Quarter Sessions—Metropolitan Police Courts Act, 1839 (2 & 3 *Vict. c.* 71), *s.* 50—*Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), *ss.* 17, 19—*Criminal Justice Administration Act*, 1914 (4 & 5 *Geo.* 5, *c.* 58), *s.* 37.

Sect. 50 of the Metropolitan Police Courts Act, 1839, provides as follows: "In every case of summary order or conviction before any of the said [metropolitan police] magistrates, in which the sum or penalty adjudged to be paid shall be more than three pounds, or in which the penalty adjudged shall be imprisonment for any time more than one calendar month, any person who shall think himself aggrieved by the order or conviction may appeal to . . . . general or quarter sessions":—

Held, that, in so far as it gives that right of appeal to a defendant who has pleaded guilty, that section is not impliedly repealed either by s. 19 of the Summary Jurisdiction Act, 1879, or by s. 37 of the Criminal Justice Administration Act, 1914.

Moseley v. *Director of Public Prosecutions* (ante, p. 16) considered and distinguished.

CASE stated by quarter sessions for the County of London.

On July 23, 1919, the appellants, Lieb Mittelmann and David Mittelmann, were charged before the respondent, a Metropolitan police magistrate, at Marlborough Street police court, for that they being both aliens did unlawfully on July 22, 1919, at the Port of London, in the City of London, in the Metropolitan Police District, land without the permission of an aliens officer contrary to the Aliens Restriction (Consolidation) Order, 1916, cl. 4. (1) The offence was one with which, under cl. 27*b* of the Order the respondent had jurisdiction to deal.

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(1) Made under the Aliens Restriction Act, 1914 (4 & 5 Geo. 5, c. 12).

The appellants severally pleaded guilty to the charge, and each of them was sentenced under cl. 26 of the order to three months' imprisonment with hard labour, and further a recommendation for their expulsion as undesirable aliens was made under the Aliens Act, 1905 (5 Edw. 7, c. 13).

The appellants, on being told that they were entitled to be tried by a jury under s. 17 of the Summary Jurisdiction Act, 1879, did not claim to be so tried.

On October 10, 1919, appeals by the appellants against the convictions, sentences and recommendations for expulsion came before the above-mentioned Court of quarter sessions.

On behalf of the respondent it was contended that the appellants, having pleaded guilty and having consented to be dealt with summarily, had no right of appeal. On behalf of the appellants it was contended that, the offences being summary offences, an appeal lay under s. 50 of the Metropolitan Police Courts Act, 1839. (1)

(1) Metropolitan Police Courts Act, 1839, s. 50: ". . . . in every case of summary order or conviction before any of the said [Metropolitan police] magistrates, in which the sum or penalty adjudged to be paid shall be more than three pounds, or in which the penalty adjudged shall be imprisonment for any time more than one calendar month, any person who shall think himself aggrieved by the order or conviction may appeal to the Justices of the Peace at the next general or quarter sessions of the peace. . . . ."

Summary Jurisdiction Act, 1879, s. 17: "(1.) A person when charged before a Court of summary jurisdiction with an offence, in respect of the commission of which an offender is liable on summary conviction to be imprisoned for a term exceeding three months, and which is not an assault, may, on appearing before the Court and before the charge is gone into but not afterwards, claim to be tried by a jury, and thereupon the Court of summary jurisdiction shall deal with the case in all respects as if the accused were charged with an indictable offence and not with an offence punishable on summary conviction, and the offence shall as respects the person so charged be deemed to be an indictable offence, and, if the person so charged is committed for trial, or bailed to appear for trial, shall be prosecuted accordingly, and the expenses of the prosecution shall be payable as in cases of felony."

Sect. 19: "Where, in pursuance of any Act, whether past or future, any person is adjudged by a conviction or order of a Court of summary jurisdiction to be imprisoned without the option of a fine, either as a punishment for an offence, or, save as herein-after mentioned, for failing to do or to abstain from doing any act or thing required to be done or left undone, and such person is not otherwise authorised to appeal to a Court of general or quarter sessions, and did not plead guilty, The Court of quarter sessions upheld the contention of the respondent, and dismissed the appeals with costs.

The question for the Court was whether the appellants in these circumstances had the right of appealing against the convictions, sentences and recommendations for expulsion. If the Court should decide in the affirmative then the appeals should be remitted to the Court of quarter sessions for rehearing; if in the negative, the order of the Court of quarter sessions dismissing the appeal with costs should be affirmed.

E. J. Purchase for the defendants, appellants. The appellants have a right of appeal to quarter sessions against their convictions.

The Metropolitan Police Courts Act, 1839, s. 50, provides that in a case of summary order or conviction before a metropolitan police magistrate any person who shall think himself aggrieved may appeal to quarter sessions. The section does not limit the right of appeal to a defendant who has not pleaded guilty. That section therefore, assuming that it has not been repealed, gives the defendants the right of appeal which they claim. That section, in so far as it gives a right of appeal to a person who has pleaded guilty, has never been expressly or impliedly repealed or superseded by any later Act. It has not been impliedly repealed either by s. 19 of the Summary Jurisdiction Act, 1879, or by s. 37 of the Criminal Justice Administration Act, 1914, because the right of appeal which it gives has been widened and extended by these Acts. Sect. 19 of the Act of 1879 in giving

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or admit the truth of the information or complaint, he may, notwithstanding anything in the said Act, appeal to a Court of general or quarter sessions against such conviction or order: Provided that this section shall not apply where the imprisonment is adjudged for failure to comply with an order for the payment of money, for the finding of sureties, for the entering into any recognizance, or for the giving of any security."

Criminal Justice Administration Act, 1914, s. 37: "(1.) Any person aggrieved by any conviction of a Court of summary jurisdiction in respect of any offence, who did not plead guilty or admit the truth of the information, may appeal from the conviction in manner provided by the Summary Jurisdiction Acts to a Court of quarter sessions."

a right of appeal which is limited to persons "not otherwise authorised to appeal" expressly recognizes as still existing the right of appeal given by s. 50 of the Act of 1839. At all events these later enactments have not repealed s. 50 of the Act of 1839 in so far as it gives a right of appeal to a defendant who has pleaded guilty. There are reasons why they should not have done so. These later enactments do not themselves give to a defendant who has pleaded guilty any right of appeal, and it frequently happens, as in the present case, that the Act or statutory order constituting the offence does not give him any right of appeal, and, therefore, if these later enactments repealed s. 50 entirely, it would follow that in many cases a defendant who had pleaded guilty and been sentenced with undue severity or was otherwise aggrieved would have no right of appeal at all. Further, it is desirable that the right of appeal from the order of a metropolitan police magistrate who sits alone should be more extensive than the right of appeal from the bench of justices who sit in the country; but if s. 50 of the Act of 1839, which applies in the metropolis, were wholly repealed by these later Acts, the result would be that the right of appeal in the metropolis would be no wider than in the rest of the country.

The present case is distinguishable from *Moseley* v. *Director of Public Prosecutions.* (1) There the appellant had been charged with an indictable offence, but by pleading guilty he had in effect altered the character of his offence and enabled the magistrate to deal with it as a summary offence under s. 13 of the Summary Jurisdiction Act, 1879, and it was held that the appellant had thus for all purposes brought his case under the code of procedure laid down by that Act, and had no right of appeal other than that provided by that Act, which, being limited to persons who had not pleaded guilty, was not available to the appellant. In the present case, on the other hand, the offence with which the appellants were charged was a summary offence, and, the appellants not having claimed to be tried by a jury, and so made the offence an indictable offence under s. 17 of the Act of 1879, have never brought their case under the code laid down by that Act, and are not limited to the right of appeal given by that Act but are entitled to avail themselves of any other right of appeal appropriate to a summary offence and therefore of that given by s. 50 of the Act of 1839.

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(1) Ante, p. 16.

Travers Humphreys and *Horace C. Fenton* for the respondent. The appellants have no right of appeal to quarter sessions.

They have no right of appeal under s. 19 of the Summary Jurisdiction Act, 1879, because that section only gives a right of appeal to a person who has not pleaded guilty. For the same reason they have no right of appeal under s. 37 of the Criminal Justice Administration Act, 1914. Neither the Aliens Restriction Act, 1914, nor the Aliens Restriction (Consolidation) Order, 1916, made in pursuance thereof, which created the offence of which the appellants were convicted, gives any right of appeal from a conviction under its provisions.

There is no ground for the contention on behalf of the appellants that they have a right of appeal under s. 50 of the Metropolitan Police Courts Act, 1839. The Summary Jurisdiction Act, 1879, s. 19, gives to a person adjudged guilty by the conviction or order of a Court of summary jurisdiction a very wide and unrestricted right of appeal to quarter sessions where he has not pleaded guilty, and that right of appeal must be taken to be substituted for the right of appeal given by s. 50 of the Act of 1839 to any person aggrieved whether he has or has not pleaded guilty. The Act of 1879 lays down a code of procedure to be followed in all cases where a person is charged with an offence before a Court of summary jurisdiction, and prescribes the conditions under which a person so charged is to be allowed to appeal: *Moseley* v. *Director of Public Prosecutions.* (1) That Act has enacted a code of procedure with regard to appeals which has been substituted for the general provisions of earlier Acts, and which, indirectly, repeals them by substitution: per Channell J. in *Reg.* v. *London Justices. Ex parte Greenwich Union.* (1) The Criminal Justice Administration Act, 1914, s. 37, re-enacted practically the same right of appeal as was given by the Act of 1879. The Legislature in twice enacting for the whole country the wide right of appeal thus given to a person who does not plead guilty, without expressly preserving the right of appeal given by the Act of 1839, in the metropolis only, to a person who does plead guilty, has shown its intention to be that the last-mentioned right of appeal should be taken away. Unless the right of appeal given by these later enactments entirely supersedes the right of appeal given by the Act of 1839, it would follow that in the metropolis a person would have one right of appeal under the later enactments if he did not plead guilty, and another and different right of appeal under the earlier enactment if he did plead guilty, but that is a result which cannot have been intended by the Legislature. A person who, like the appellant, has been convicted of a summary offence first created in 1914, has the ordinary right of appeal provided in respect of such offences by the Act of 1879, and he cannot avail himself of a special and unusual right of appeal given by an Act passed so long ago as 1839. The present case is distinguishable from *Harris* v. *Cooke* (2), in which it was held by a Divisional Court that a person, who had pleaded guilty to a summary offence, and had been convicted, was entitled to appeal. In that case the offence was under the Defence of the Realm Regulations Consolidated, which by reg. 58 give a right of appeal to the defendant whether he has pleaded guilty or not; whereas in the present case the offence is under a statutory order which does not give any right of appeal.

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(1) Ante, p. 16.

The reason why a more extensive right of appeal is given by the Act of 1839 in the metropolis than by the later Acts in the country at large cannot be that the decisions of a metropolitan magistrate are less likely to be correct in law than those of a bench of justices in the country, because his decisions are more likely to be correct than theirs, seeing

(1) [1900] 1 Q. B. 438, 440.

(2) [1918] W. N. 317.

that he must be a barrister of at least seven years' standing, while they have not necessarily any legal training. The true explanation why an extensive right of appeal was given under the Act of 1839 is that that Act created a large number of new petty offences which had not previously been dealt with by any tribunal.

If s. 50 of the Act of 1839 has not been entirely repealed by the later Acts, it only remains unrepealed in so far as it gives a right of appeal in cases arising under that Act and earlier Acts. The case of *Reg.* v. *London Justices. Ex parte Greenwich Union* (1) does, no doubt, seem to recognize that for some purposes the section may still remain in force.

EARL OF READING C.J. The appellants were charged with the offence that they being aliens did unlawfully land at the Port of London without the permission of an aliens officer, contrary to the Aliens Restriction (Consolidation) Order, 1916, which was made in pursuance of the Aliens Restriction Act, 1914. The appellants severally pleaded guilty and were each sentenced to three months' imprisonment with hard labour, and a recommendation was made for their expulsion as undesirable aliens under the Aliens Act, 1905. The opportunity was given to them of electing to be tried by a jury under s. 17 of the Summary Jurisdiction Act, 1879, but they did not avail themselves of that opportunity. Their offence therefore remained a summary offence and did not become an offence which should be deemed to be an indictable offence. The appellants appealed against their conviction to quarter sessions. It was contended on their behalf that notwithstanding that they had pleaded guilty they had a right of appeal under s. 50 of the Metropolitan Police Courts Act, 1839. (2) [His Lordship read that section.] It was argued on behalf of the prosecution that the appellants had no right of appeal even under that section, and the justices upheld that objection and dismissed the appeal.

(1) [1900] 1 Q. B. 438.

(2) See note (1), ante, p. 520.

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MITTELMANN
v.
DENMAN.

Earl of Reading
C.J.

The question for the decision of this Court is whether the appellants have a right of appeal to quarter sessions under s. 50 of the Act of 1839. It has been contended before us that the right of appeal under that section has been entirely taken away either by the Summary Jurisdiction Act, 1879, or by the Criminal Justice Administration Act, 1914. In support of that contention reliance has been placed upon the case of *Moseley* v. *Director of Public Prosecutions* (1). I am satisfied that that case does not govern the present case. There the offence with which the appellant had been charged was an indictable offence. Until the passing of the Act of 1879 an indictable offence had to be sent for trial as such, and it only became triable as a summary offence by virtue of that Act. The offence was dealt with as a summary offence under that Act, and the appellant was convicted, and appealed. The Court applied the principle that where a statute creates the jurisdiction to try an offence and gives a right of appeal from the order made at the trial, it ought to be inferred that the only right of appeal is that which is given by the statute conferring the jurisdiction. Accordingly, the Court came to the conclusion that the appellant in that case could not claim a right of appeal under s. 50 of the Act of 1839, but that the Act of 1879 prescribed the only right of appeal to which he was entitled, and as the appellant, who had pleaded guilty, could not avail himself of the latter right of appeal, the result was that he could not appeal. In that case the Court left open the question which has been argued in the present case because it did not there arise, and also because it was desired to hear further argument upon it. Having now heard that question fully discussed, I find nothing in the Act of 1879 which would justify the Court in concluding that that Act has entirely taken away the right of appeal which had been given by s. 50 of the Act of 1839. The Act of 1879 contains no express words having that effect, and I think it would be going too far to construe the language which it does use as impliedly repealing in its entirety a right of appeal which had been in existence for about forty years. In my opinion that Act has not repealed s. 50 of the earlier Act in so far as it gives, in the cases to which it relates, a right of appeal to a person who has pleaded guilty.

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(1) Ante, p. 16.

It is further contended on behalf of the prosecution that the right of appeal given by s. 50 of the Act of 1839 has been taken away, even as regards persons who have pleaded guilty by s. 37 of the Criminal Justice Administration Act, 1914. (1) [His Lordship read the latter section. (1)] That section does not in express language deal with the case of a person who has pleaded guilty, and it is therefore obvious that it does not directly apply to the case of the present appellants, who did plead guilty. It is contended, however, that in giving a right of appeal to any person aggrieved by any conviction of a Court of summary jurisdiction in respect of any offence, who did not plead guilty, that section uses such wide and ample terms and so completely sweeps away all the special conditions and restrictions to which the right of appeal given by s. 50 of the Act of 1839 was subject, that it must be concluded that it has by implication entirely repealed that earlier section, and that even a person who has pleaded guilty has now no right of appeal under that section. I am unable to accept that view. In my judgment, where a right of appeal has hitherto been available under certain conditions to a person who has pleaded guilty, we ought not to hold that that right has been taken away by a subsequent Act unless we find in that Act language which compels us to do so. In this instance it seems to me that the requisite language is not to be found.

I see no difficulty in construing s. 37 of the Act of 1914 as not entirely inconsistent with s. 50 of the Act of 1839, and therefore as not entirely repealing that section by implication. It is inconsistent with that section to this extent, that it gives to a person who has not pleaded guilty a greater right of appeal than he had under that section, inasmuch as it sweeps away the conditions by which his right of appeal was affected under that section. It leaves untouched,

(1) See note (1), ante, p. 521.

however, in my judgment, that part of s. 50 which provides that a person may appeal notwithstanding that he has pleaded guilty. I am not prepared to say that a right of such importance as the right of appeal given by s. 50 of the Act of 1839 to a person who has pleaded guilty has been taken away by words to which, without doing them any violence, I can give a perfectly definite meaning, which, however extended it may be, nevertheless preserves that right of appeal to the extent already indicated.

It may be that it is undesirable that there should be a difference in practice between London and the rest of the country as regards the right of appeal from Courts of summary jurisdiction; but if uniformity of practice is to be secured in this respect it must be by the action of Parliament.

In my judgment this appeal should be allowed and the case remitted to quarter sessions.

SANKEY J. I entirely agree. I think we should be very careful, before we decide that a statute takes away a right of appeal in criminal cases, to find that it does so in the clearest words. Upon the face of it, s. 37 of the Criminal Justice Administration Act, 1914, shows that its intention is to enlarge the right of appeal in cases of this kind. I do not think that we ought to read a section which is meant to enlarge the right of appeal in these cases as impliedly restricting the right of appeal given by a previous Act.

SALTER J. I agree.

Appeal allowed. Case remitted to quarter sessions.

Solicitors for appellants: *Percy Bono & Co.*
Solicitors for respondent: *Wontner & Sons.*

J. R

YUANMI GOLD MINES, LIMITED, Appellants *v.* EBORALL (SURVEYOR OF TAXES), Respondent.

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Dec. 16, 17.

Revenue—Income Tax—Computation of Profits—Diminution due to Circumstances attributable to War—Income Tax Act, 1842 (5 *&* 6 *Vict. c.* 35), *s.* 133—*Revenue Act,* 1865 (28 *&* 29 *Vict. c.* 30), *s.* 6—*Finance Act,* 1914 (*Session* 2) (5 *Geo.* 5, *c.* 7), *s.* 13. (1)

A company made profits for their financial year 1913, of 76,385*l.*, for the year 1914 of 36,450*l.*, and for the year 1915 of 16,045*l.* For their financial year ending June 30, 1916, the company made a loss of 11,135*l.* The diminution in the profits of the company for the year ending June 30, 1916, due to circumstances attributable directly or indirectly to the present war was taken to be the sum of 6000*l.* The company were assessed by the Commissioners to income tax in respect of their financial year ending June 30, 1916, which was agreed should be taken to represent the tax year ending April 5, 1917, upon the average profits for the three years preceding the year of assessment—namely, 1913, 1914, 1915—in the sum of 42,960*l.* less the sum of 6000*l.*—being the amount of diminution of the company's profits and gains in the year of assessment attributable to the present war:—

Held, that the combined result of s. 13, sub-s. 1, of the Finance Act, 1914 (Session 2), s. 133 of the Income Tax Act, 1842, and s. 6 of the Revenue Act, 1865, was that the company were liable to be assessed for the year ending June 30, 1916, upon the average of the profits for the year of assessment and the two preceding years, the profits for the year of assessment being taken to be the average of the profits for the three years preceding the year of assessment less the amount by which the profits of the company, during the year of assessment, had been diminished by circumstances attributable, directly or indirectly, to the present war.

Held, further, that s. 133 of the Act of 1842, as amended by s. 6 of the Act of 1865, does not confer upon the Commissioners an absolute discretion to amend an assessment to any figure they think fit provided the assessment is not reduced lower than the basis fixed in the Act of 1865. The Commissioners have only power to amend the assessment having regard to the actual profits and gains for the year of assessment.

Case stated under s. 59 of the Taxes Management Act, 1880, by the Commissioners for the General Purposes of the Income Tax Acts for the City of London.

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(1) By s. 13, sub-s. 1, of the Finance Act, 1914 (Session 2), it is enacted as follows: "Sect. 133 of the Income Tax Act, 1842, and s. 6 of the Revenue Act, 1865 (which provide for the reduction of assessments or the repayment of duty in certain cases where the profits of the year of assessment fall short of the sum on which the assessment has been made) shall, notwithstanding their repea

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YUANMI GOLD MINES, LIMITED *v.* EBORALL.

At a meeting of the Commissioners held on March 19, 1918, the Yuanmi Gold Mines, Ld. (hereinafter called the company) appealed against an assessment raised upon them under s. 2, Sched. D, of 16 & 17 Vict. c. 34, in the sum of 42,960*l.* less depreciation 13,023*l.* for the year ending April 5, 1917.

The company, who were the owners of gold-mining leases and options in Western Australia, were incorporated on April 27, 1911, under the Companies (Consolidation) Act, 1908, with a capital of 350,000*l.*, and having their registered office in the City of London.

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by s. 24 of the Finance Act, 1907, have effect as respects any assessment to income tax for the current income tax year where it is proved to the satisfaction of the Commissioners, by whom the assessment has been made, that the diminution of profits and gains on account of which relief is claimed under those sections is due to circumstances attributable directly or indirectly to the present war, whether those circumstances are a specific cause of the diminution of income within the meaning of s. 134 of the Income Tax Act, 1842, or not; and diminution of profits and gains on account of which relief can be given under this section shall not be deemed to be a specific cause authorising the grant of relief under the said s. 134."

(2) By s. 133 of the Income Tax Act, 1842, it is enacted: "If within or at the end of the year current at the time of making any assessment under this Act, or at the end of any year when such assessment ought to have been made, any person charged to the duties contained in Sched. (D), whether he shall have computed his profits or gains arising as last aforesaid on the amount thereof in the preceding or current year, or on an average of years, shall find, and shall prove to the satisfaction of the Commissioners by whom the assessment was made, that his profits and gains during such year for which the computation was made fell short of the sum so computed in respect of the same source of profit on which the computation was made, it shall be lawful for the said Commissioners to cause the assessment made for such current year to be amended in respect of such source of profit, as the case shall require. . . . ."

(3) By s. 6 of the Revenue Act, 1865, it is enacted: "And whereas by s. 133 of the said Act of the fifth and sixth years of Her Majesty's reign provision is made for giving relief, by reduction of the assessment, or repayment of duty, in certain cases where the profits of the year of assessment fall short of the sum on which the assessment has been made: Be it enacted, that no such reduction or repayment shall be made in any such case unless the profits of the said year of assessment are proved to be less than the profits for one year on the average of the last three years, including the said year of assessment; nor shall any such relief extend to any greater amount than the difference between the sum on which the assessment has been made and such average profits for one year as aforesaid."

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The assessment was raised upon the average profits for the three years previous to the year of appeal as follows :—

For the year ending June 30, 1913	..	76,385*l.*
,, ,, ,, 1914	..	36,450*l.*
,, ,, ,, 1915	..	16,045*l.*
		3)128,880*l.*
		42,960*l.*
Less depreciation ..	..	13,023*l.*

For the year ending June 30, 1916, a loss of 11,135*l.* was shown by the accounts of the company. The general manager's report for the year summarised the reason for this loss as follows: "Owing to the total exhaustion of the oxidised ore of the mine and later the decrease in the supplies of semi-sulphide ore the tonnage capacity of the plant was adversely affected. This has reacted unfavourably on the average costs while the increased prices of all mining supplies due to war conditions has added to the difficulties of the position. The continued withdrawal of the best of the younger men for service with the expeditionary forces has impaired the labour efficiency."

The company claimed the benefit of the relief afforded by s. 13, sub-s. 1, of the Finance Act, 1914 (Session 2) (1.), s. 133 of the Income Tax Act, 1842 (2.), and s. 6 of the Revenue Act, 1865 (3.) on the ground that the profits of the company for the year of assessment had been diminished by reason of circumstances attributable directly or indirectly to the present war, and sought to have the assessment amended under s. 133 of the Income Tax Act, 1842, by substituting the above-mentioned loss of 11,135*l.* made during the year 1916 for the above-mentioned profit of 76,385*l.* made during the year 1913, thereby reducing the assessment as follows :—

For the year ending June 30, 1914	..	36,450*l.*
,, ,, ,, 1915	..	16,045*l.*
		52,495*l.*
Less for the year ending June 30, 1916	..	11,135*l.*
		3)41,360*l.*
		13,787*l.*
Less depreciation ..	..	13,023*l.*

For the purposes of this case it was agreed that the financial year of the company ending June 30, 1916, should be taken to represent the tax year ending April 5, 1917.

Evidence was given before and accepted by the Commissioners that the profits of the company had during the year ending June 30, 1916, been diminished by circumstances attributable to the war to the extent of about 6000*l.*, and that the said profits had been further diminished, and to a much greater extent, by circumstances not attributable to the war.

It was admitted and agreed between the parties that for the purposes of this case the diminution in profits for the year ending June 30, 1916, attributable directly or indirectly to the present war, should be taken to be the sum of 6000*l.*

On behalf of the surveyor of taxes it was contended that the appellants were only entitled to such relief as the case should appear to the Commissioners to require, and that, as it was admitted and agreed that the diminution in profits for the year ending June 30, 1916, due to circumstances attributable directly or indirectly to the war was the sum of 6000*l.*, the fair and equitable requirements of the case would be met by the reduction of the assessment by that amount.

The Commissioners on the facts as stated or admitted held that the assessment required amendment, and they reduced the sum by the sum of 6000*l.*, being the agreed amount of diminution of profits or gains attributable to the present war.

Disturnal K.C. and *A. M. Latter* for the appellant company. The decision of the Commissioners in this case was wrong. The appellants, having regard to the facts stated in the case, are entitled under s. 13, sub-s. 1, of the Finance Act, 1914 (Session 2), to the benefit of the provisions of s. 133 of the Income Tax Act, 1842, and s. 6 of the Revenue Act, 1865. The effect of those sections is that the appellants, in computing their liability to income tax for the year ending June 30, 1916, are entitled to estimate their profits on the average of the three years ending on June 30, 1914, 1915 and 1916 respectively. Sect. 13, sub-s. 1, of the Act of 1914 does not require or enact that the relief to be given is to be limited to the amount of the losses attributable to the war. There is no provision requiring the Commissioners to ascertain or apportion the losses attributable to the war. As soon as it is proved that there is a diminution in the profits or gains in the year of assessment due to circumstances attributable to the present war then the mode of calculation provided by s. 133 of the Act of 1842, as amended by s. 6 of the Act of 1865, is brought into operation, and regard must be had to the total diminution in the profits or gains in order to arrive at the proper assessment and not merely to the diminution attributable to the war.

T. H. Parr (*Sir Ernest Pollock S.-G.* and *R. P. Hills* with him) for the surveyor of taxes. Ample relief is afforded by s. 23 of the Customs and Inland Revenue Act, 1890, where a loss has been sustained in the year of assessment. The appellants, however, have not chosen to avail themselves of that mode of relief. The appellants are only entitled under s. 13, sub-s. 1, of the Finance Act, 1914 (Session 2), s. 133, of the Income Tax Act, 1842, and s. 6 of the Revenue Act, 1865, to have their assessment amended and reduced by such amount as the case should appear to the Commissioners to require. Where there is a diminution in profits due to circumstances attributable to the war the matter is left to the discretion of the Commissioners to amend the assessment as the case shall require. Sect. 6 of the Revenue Act, 1865, merely provides the maximum relief which can be given. It does not entitle the appellants to have their assessment reduced to a sum representing their profits or gains on an average of three years including the year of assessment, but only provides that the relief which can be given under s. 133 of the Act of 1842 is not to exceed the difference between the average profits for the three years preceding the year of assessment and the average profits for three years consisting of the two preceding years and the year of assessment itself. The diminution of profits or gains for the year of assessment due to circumstances attributable directly or indirectly to the war is admittedly 6000*l.* and no more, and therefore the utmost relief to which the appellants could be entitled is the reduction of their assessment by that amount.

A. M. Latter in reply. Sect. 13 of the Finance Act, 1914 (Session 2), expressly gives a right to relief where it is proved that there has been a diminution of profits and gains due to circumstances attributable to the war, and does not merely leave the relief to be granted at the discretion of the Commissioners. The Commissioners can only deal with a claim under s. 133 of the Act of 1842 at the end of the year of assessment in one way—namely, by dealing with the profits of that year and seeing how far they fall short of the computed profits and gains: *Russell* v. *North of Scotland Bank* (1); *Reg.* v. *Commissioners for Special Purposes of the Income Tax.* (2).

Rowlatt J. This case raises a somewhat troublesome question, and it is perhaps not easy completely to give literal effect to everything in the Acts, but as I have arrived at a conclusion I think I may as well deliver my judgment at once instead of taking time to consider it.

The appellant company was assessed for the year 1916 on the average of the profits of the three preceding years in the usual way, and as the three preceding years showed profits, in round figures, in 1913 of 76,000*l.*, in 1914 of 36,000*l.*, and in 1915 of 16,000*l.*, and the average of those three sums amounted to 42,000*l.*, they were assessed for 1916 upon that sum. As a matter of fact the company in 1916 made a loss of 11,000*l.* and the question is as to how the assessment ought to be adjusted in view of that result.

This involves ascertaining the effect of s. 13, sub-s. 1, of the Finance Act, 1914 (Session 2), a sub-section which restores generally in the case of losses due to the war the machinery of s. 133 of the Income Tax Act, 1842, as amended by s. 6 of the Revenue Act, 1865. By the Act of 1842 income tax was imposed upon annual profits and gains. I think it is clear that the scheme of the Act was to endeavour to tax a man upon certainly not more than the income which he enjoyed in the year. It is true that in some cases the income was estimated upon an average of previous years or, in certain cases, upon one year only. Sect. 133 however contained a provision for revising the assessment where the actual income of the year of assessment fell short of the amount calculated on an average of years. Under s. 134, when a man's income failed altogether for specific causes like death, bankruptcy, insolvency or going out of business, before the end of the year of assessment, then relief was given except in respect of the time before the specific cause operated. That was the scheme of that Act, and in those days it had not occurred to anyone to tax persons in respect of years in which they made losses or in which they made no profit. That method of taxation has been largely introduced now in a variety of ways. Sect. 133 of that Act provided, to put it shortly, that where it is proved at the end of a year of assessment that the profits and gains during that year fall short of the sum computed upon the average then it shall be lawful for the Commissioners to cause the assessment to be amended in respect of the source of profit in question as the case shall require and to order repayment of what is overpaid. What is the effect of the words "as the case shall require"? What materials are they to consider? Does this give them a free hand to assess the person in question upon any figure that they think fit, less than what he had been assessed at upon the average or does not the section assume that the assessment is to be corrected according to the actual facts, and that the words "as the case shall require" simply mean amended to the actual figures of the profits and gains, it being the main object of the Act to tax the profits and gains during the year. In my judgment the latter reading was the effect of that section as it then stood. But s. 133 of the Act of 1842 was altered by s. 6 of the Revenue Act, 1865, because it was too unfavourable to the revenue. Sect. 6 of the Act of 1865 enacted that relief should not be given beyond a certain extent, and that the assessment should be reduced not to the actual profits of the year of assessment but to the sum which would be ascertained if the year of assessment had been included in the three years' average instead of the first year of the three years' average, that is, putting the three years' average a year later so as to include the year of assessment. Under that Act, so far as my experience goes I think that it was always considered that the adjustment had to be made upon those lines. Under s. 133 of the Act of 1842 a man could get his assessment upon his actual profits during the year of assessment, but under s. 6 of the Act of 1865 the reduction of a man's assessment was limited to the extent of bringing the year of assessment into the three years' average instead of the year four years previously. That was the rule acted upon in *Russell* v. *North of Scotland Bank*. (1) It has certainly been universally considered that it was the right of the subject to have his assessment corrected in that way.

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(1) (1891) 3 Tax Cas. 14; 28 Sc. L. R. 389.

(2) (1888) 21 Q. B. D. 313.

Those two sections were repealed in 1907 and a different system was substituted, but they were reintroduced in view of the war by s. 13 of the Finance Act, 1914 (Session 2), which is the section immediately for consideration. That section says that the two repealed sections shall have effect notwithstanding their repeal as respects any assessment to income tax for the current income tax year where it is proved to the satisfaction of the Commissioners that the diminution of the profits and gains on account of which relief is claimed is due to circumstances attributable directly or indirectly to the present war, but it is enacted that the war shall not be a specific cause under s. 134. What is meant by the words "diminution in respect of which relief is claimed"? Those words must have been used to distinguish the amount by which, in the language of s. 133, the actual income falls short of the profits and gains computed upon an average of years. Therefore in this case the computation of the company's profits and gains upon an average of years, being 42,000*l*. and the actual amount of the profits and gains being a minus quantity of 11,000*l*., the falling short of the profits and gains is either 42,000*l*. or, if you can add the minus quantity which is a matter of metaphysics, the falling short is 53,000*l*. It is either 42,000*l*. or 53,000*l*., and on the facts I do not think it matters which. Before however the machinery of s. 133 of the Act of 1842, as amended by s. 6 of the Act of 1865, is brought into operation at all it has to be proved that the loss is due to circumstances attributable directly or indirectly to the present war. Now the falling short in the profits and gains of this company during the year of assessment is not, according to the facts, all attributable to the war. The figure of 6000*l.* has been taken. I do not know that is the correct figure, but it has been taken in order to have some definite figure to work upon, as representing the amount of the diminution of the company's profits and gains in the year of assessment owing to the war. The company therefore cannot prove in terms that the diminution in their profits in respect of which relief is claimed—namely, the difference between 42,000*l.* and minus 11,000*l.*—if that is the diminution referred to in s. 133, is due to the war, because only a comparatively small part of the diminution is due to that cause. Whoever drafted the section did not appreciate that a diminution is not a single indivisible thing but may be due to several causes, and that is why the section is expressed in that way. It might be said by the Crown that this section does not therefore apply at all; but that would I think be very unreasonable, and would not give effect to what seems intended. On the other hand Mr. Disturnal has contended that as soon as it is once proved that there is a diminution in the profits and gains of the company due to the war then the mode of calculation provided by s. 133 of the Act of 1842 as amended by s. 6 of the Act of 1865 is brought into operation, and that the diminution in the profits and gains which can be brought into the calculation for the purpose of arriving at the proper assessment is the diminution in the profits and gains due to all causes and not merely the diminution attributable to the effects of the war. That seems to me to be equally unreasonable in the other direction. But there is a via media which seems to me to carry out what was obviously intended, and that is to read s. 13 of the Act of 1914 as requiring the machinery of s. 133 of the Act of

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(1) 3 Tax Cas. 14; 28 Sc. L. R. 389.

1842 as amended by s. 6 of the Act of 1865 to be brought into operation, but that only such diminution of profits and gains is to be regarded as is caused by the war. Or, to put it in another way, s. 13 of the Act of 1914 prevents the subject from claiming relief in respect of any diminution in profits and gains other than that which he can prove is due to the present war.

In these circumstances the company allege that their profits and gains in the year of assessment have fallen short of the sum computed upon an average of years to the extent of 42,000*l.* or 53,000*l.*, but inasmuch as most of that diminution was due to causes other than the war it cannot be taken into account, but they can prove that they have suffered a diminution in profits to the extent of 6000*l.*, which was due to the war, and therefore their income for the year 1916 must be taken to be 36,000*l.* From some points of view it is not really reasonable to take that figure because in fact their income for that year was nothing like 36,000*l.*, but still I think that figure although artificial is the one which is arrived at by construing this section in the most reasonable way. Therefore the calculation in this case will be that the company will be assessed upon the average of the profits of the three years, 1914, 1915 and 1916—namely, upon the average of 36,000*l.*, 16,000*l.* and 36,000*l.*, which makes them taxable on something like 29,000*l.* The profits of the year 1913, amounting to 76,000*l.*, are not brought into the average, and the profits of the year 1916, which, calculated in the way I have indicated, amount to 36,000*l.*, are brought into the average. Of course if the profits of the first year had happened to be a small one and the profits of the year brought into account had happened to be a big one the company might get no relief through the operation of the machinery of these sections; they might even have added to their assessment. That is what I think ought to be done. The Commissioners have however done something entirely different; they have simply knocked off 6000*l.* from the 42,000*l.* which is the average of the company's profits for the three years preceding the year of assessment. That is merely arbitrary. I do not say it is unjust but it is arbitrary, and can only be justified by construing s. 133 of the Act of 1842 and s. 6 of the Act of 1865 as conferring upon the Commissioners an absolute discretion to fix what figure they choose provided they do not reduce the assessment lower than the basis named in the Act of 1865. At the beginning of my judgment I gave my reasons for saying that the Commissioners had not an absolute discretion, but that they must adopt real figures, and therefore the case must go back to the Commissioners unless the figure of 6000*l.* is to be taken as agreed.

Solicitors for appellants: *Broad & Son.*
Solicitor for Surveyor of Taxes: *Solicitor of Inland Revenue.*

R. F. S.

Applied. KEINER v. KEINER. [1952] 1 All E.R. 643.

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Nov. 12, 13;
Dec. 9.

[1918. I. 622.]

Contract—Loan to American Company—Interest payable in London—Contract to be construed by English Law—Right of Company to deduct United States Income Tax.

A railway company, which was incorporated and carried on business in the United States, in 1905 issued first mortgage 5 per cent. gold bonds to the plaintiff company to the amount of 500,000*l.*, and undertook by a deed of trust to pay the principal money and interest in London. The defendant company, who were parties to the deed of trust, guaranteed the payment of those sums if the railway company made default. A clause in the deed of trust provided that it should be construed, and the rights of all parties claiming thereunder should be regulated, by the law of England, the railway company agreeing to be sued in England. Both the plaintiffs and defendants were English corporations. Subsequently an income tax of 2 per cent. was imposed by the United States Government upon (inter alia) income derived by foreign corporations from interest on bonds of corporations resident in the United States. The railway company in making a half-yearly payment of interest on its bonds claimed to deduct the United States income tax:—

Held, that there was no English statute which allowed payment of income tax to a foreign country to be considered as a discharge of an

English contract, and that at common law a contract made in this country was not governed by the law of another country, and further that there could not be impliedly read into the contract a stipulation that the plaintiffs agreed that the provisions of the United States Income Tax Acts should be enforceable against them in England, and that therefore the American railway company and the defendant company were not entitled to deduct United States income tax from the sums they agreed to pay to the plaintiffs as interest on the bonds.

Action tried by Sankey J. without a jury.

By an indenture dated November 24, 1905, and made between the Tonopah and Tidewater Railroad Company (thereinafter referred to as the railroad company) of the first part, the defendants (thereinafter referred to as the Borax company) of the second part, and the plaintiffs (thereinafter referred to as the trustees) of the third part, after reciting an indenture dated November 1, 1905, and made between the railroad company and the Mechanics Trust Co. (thereinafter referred to as the trust company), and that the railroad company had determined to execute and issue first mortgage 5 per cent. gold bonds redeemable at par on July 1, 1960, or prior thereto at 105 per cent. to the amount of 500,000*l.*, and in order to secure the bonds to execute and deliver to the trust company as trustees a first mortgage or deed of trust of all its real and personal estate with all its franchises, the railroad company conveyed to the trust company all the property real personal and franchises mentioned in the indenture of November 1, 1905, to hold in trust for the benefit security and protection of the several persons and corporations who should from time to time hold and own the said bonds or any other bond or bonds issued in lieu thereof; and also reciting that it had been arranged for convenience that only one bond for the full sum of 500,000*l.* should be issued by the railroad company, but that the trustees should be entitled to require to be issued to them in lieu of such one bond such and so many bonds of an equivalent total value as they might require not exceeding 5000 bonds in all, and reciting that it had been agreed that the bond should be dealt with in manner thereinafter appearing, and that the Borax company should give such guarantee in respect of the said bond and the interest thereon as was thereinafter contained, and also reciting that in pursuance of the agreement and for the purpose of securing the payment of the principal moneys and interest mentioned in the certificates to be issued as thereinafter mentioned the railroad company was about to issue to the present trustees (namely, the plaintiffs) one bond for the sum of 500,000*l.*, and that the railroad company had allotted to the subscribers thereof debenture stock certificates to the amount of 500,000*l.* against the bond, it was provided as follows :—

Clause 4 : "The railroad company shall duly pay and remit to the trustees in London the principal moneys, premiums and interest at 5 per cent. secured by the said bonds so that the same respectively shall be in the hands of the trustees 15 days before the dates on which the same respectively shall fall due and be payable, and the trustees shall apply the moneys received by them from the railroad company in respect of interest on the said bond or bonds in the first place in paying to the holders of the certificates interest at the rate of 4½ per cent. per annum on the amounts secured by the certificates held by them respectively. Such interest shall be paid to the holders of certificates on the 15th day of April and the 15th day of October in each year. And the trustees shall after payment of interest at the rate of 4½ per cent. on the sums secured by the certificates for the time being outstanding in the next place pay the balance of the said moneys received by them in respect of the interest on the said bond to the Borax Company."

Clause 8 : "The Borax Company in pursuance of the said agreement and in consideration of the payment to them of ½ per cent. per annum out of the interest at the rate of 5 per cent. payable on the said bond or bonds or the payment to them of the balance of the interest payable on the said bond or bonds in accordance with clause 4 hereof covenant with the trustees as follows :—

"(A) If the railroad company shall make default in the fulfilment of any of the stipulations of clause 4 hereof they the Borax Company will pay to the trustees at the expiration of

7 days after demand in writing thereof shall have been made upon the Borax Company by or on behalf of the trustees the sum or sums of money in payment of which the railroad company shall have made default.

"(E) This covenant and guarantee shall be a continuing security and shall remain in operation until the redemption or payment of the whole of the said bonds."

Clause 27: "These presents shall be construed and the rights of all persons claiming hereunder shall be regulated by the law of England. And the railroad company doth hereby agree that in case it shall be necessary for the trustees to take legal proceedings against the railroad company in connection with these presents or for effectuating the security hereby created it shall be lawful for the trustees to sue the company in England in its corporate name and in order to give effect to the intention of the foregoing provision the railroad company hereby agrees to be bound in all things by the jurisdiction of the English Courts and the railroad company shall be deemed to have and at all times during the continuance of this security to retain domicile and residence in England and that service of any writ of summons or other process issued at the suit of the trustees against the railroad company effected by leaving a copy of such writ or other process at the registered office for the time being of the Borax Company in London shall be deemed to be good and effectual service of such writ or other process upon the railroad company."

By the Income Tax Act of the United States of America, 1916, c. 463 (as amended by the War Income Tax Act, 1917, c. 63), it was provided that an income tax at the rate of 2 per cent. to be paid annually should be levied assessed and imposed upon the income received in the preceding year from all sources within the United States by every individual, a non-resident alien, including interest on bonds notes or other interest-bearing obligations of residents, corporate or otherwise; and also that these should be levied assessed and imposed an income tax to be paid annually at the rate of 2 per cent. upon the net total income received in the preceding year from all sources within the United States by every corporation, joint stock company or association organised authorized or existing under the laws of any foreign country, including interest on bonds notes or other interest-bearing obligations of residents corporate or otherwise. The Acts also contained provisions authorising and requiring the said tax to be deducted and withheld and paid to the officers of the United States Government authorised to receive the same from the income of non-resident alien individuals from sources within the United States, and the same provisions were made applicable to the tax imposed upon incomes derived from interest upon bonds and mortgages or deeds of trust or similar obligations of domestic or other resident corporations, joint stock companies or associations, by non-resident alien companies corporations and joint stock companies not engaged in business or trade within the United States and not having any office or place of business therein.

The railroad company was a corporation incorporated under the laws of the State of New Jersey in the United States. Both the plaintiffs and the defendants were English corporations incorporated under the English Companies Acts.

On April 2, 1918, the railroad company or the defendants paid to the plaintiffs the sum of 11,025*l.* on account of the interest due on April 1, 1918, at the rate of 5 per cent. on the sum of 500,000*l.*, the amount of the bonds.

By a letter dated April 9, 1918, the plaintiffs demanded from the defendants payment of the sum of 1475*l.*, being the difference between the sum of 11,025*l.* and the sum of 12,500*l.* being the interest at the rate of 5 per cent. on the sum of 500,000*l.*

The plaintiffs claimed to recover from the defendants the sum of 1475*l.*, or alternatively the sum of 225*l.*, being the said sum of 1475*l.* less 1250*l.* repayable to the defendants by the plaintiffs in consideration and in the event of the performance by the defendants of their covenant contained in clause 8 (A) of the indenture of November 24, 1905.

The defendants, by their defence, alleged that the railroad company being a corporation incorporated in America was subject to and bound by the United States Income Tax Acts,

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and was entitled thereunder to deduct and withhold tax at the rate of 2 per cent. from the payment of interest at the rate of 5 per cent. on the sum of 500,000*l.*, and that no further sum beyond the 11,025*l.* paid by the railroad company or by the defendants to the plaintiffs was payable by the railroad company or by the defendants to the plaintiffs. The defendants said that they were entitled to be paid and to retain the sum of 1250*l.* out of the 12,500*l.*, and from the remaining sum of 11,250*l.* the railroad company and/or the defendants, who were guarantors only for the railroad company, were entitled to deduct or withhold and retain the sum of 225*l.*, being tax at 2 per cent. in accordance with the Income Tax Laws of the United States.

Leslie Scott K.C. and *A. M. Latter* for the plaintiffs. The indenture of November 24, 1905, is an English contract as it was made in this country, and payment under it had to be made in London, and therefore it must be construed according to English law. The parties to the deed expressly provided in clause 27 that it should be construed, and the rights of all persons claiming under it should be regulated by the law of England. That is conclusive on the point. The interpretation of a contract and the rights and obligations under it of the parties thereto must be determined in accordance with the law by which the parties to the contract intended, or may fairly be presumed to have intended, the contract to be governed: see Dicey's Conflict of Laws, 2nd ed., rules 146, 152. In Story's Conflict of Laws, 8th ed., § 263 it is stated that "the law of the place of the contract is to govern as to the nature, the obligation, and the interpretation of the contract, locus contractûs regit actum." Lord Herschell L.C. pointed out in *Hamlyn & Co.* v. *Talisker Distillery* (1) that the place where the contract was made and the place where it was to be performed were both matters which must be taken into consideration, but neither of them was of itself conclusive as to the particular law which was intended to govern particular parts of the contract between the parties.

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(1) [1894] A. C. 202, 208.

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The whole of the contract must be looked at and the rights under it must be regulated by the intention of the parties as appearing from the contract. Here it is clear from clause 27 of the contract that the parties intended that their rights under the contract should be governed by English law. A discharge of a contract not in accordance with the law by which the parties to the contract intended, or may fairly be resumed to have intended, the contract to be governed is not a valid discharge: see Dicey's Conflict of Laws, rule 153. In Story's Conflict of Laws the rule is expressed in § 342 thus: "A discharge of a contract by the law of a place where the contract was not made, or to be performed, will not be a discharge of it in any other country": see *Smith* v. *Buchanan* (1); *Gibbs* v. *Société des Métaux* (2); *New Zealand Loan and Mercantile Agency Co.* v. *Morrison.* (3) The fact that one of the parties to the contract is of American domicil is immaterial: *Gibbs & Sons* v. *Société des Métaux.* (2) The fact that the American Income Tax Acts made the deduction of income tax from interest equivalent to payment to the person entitled to receive the interest is irrelevant as the English Courts do not recognize the fiscal laws of foreign countries as altering the position of parties to an English contract The plea by the defendants of tender of the 5 per cent. interest less the income tax imposed by the United States is a bad plea. The contract being made in England the defendants are bound to perform it in its integrity, and it is no defence to say that a foreign power has intervened: see *Spiller* v *Turner* (4); *Sydney Municipal Council* v. *Bull.* (5)

Finlay K.C. and *Bremner* for the defendants. The defendants are entitled to succeed. The railway company were under a duty to deduct and pay to the United States fiscal authorities, in accordance with the United States Income Tax Acts, income tax on bonds held outside the United States. A note in Dicey's Conflict of Laws, 2nd ed., p. 554, is to the following effect: "*Jacobs* v. *Crédit Lyonnais* (6) suggests the conclusion that an English contract to be performed in France, the performance whereof is, at the time when the contract is made, lawful by French law, may be valid in England, even though at the time for the fulfilment of the contract the performance thereof is forbidden by French law. This inference is suggested by the headnote to the report of *Jacobs* v *Crédit Lyonnais* (1), and by some expressions in the case, but is (it is submitted) erroneous. *Jacobs* v. *Crédit Lyonnais* (1) only decides that a person who enters into an English contract—i.e., a contract governed by the law of England—is not excused for its non-performance in France by circumstances which take place after the contract is made, and afford a legal excuse for non-performance under French, though not under English, law. It does not appear from the case that it would have been illegal under French law to have shipped the cargo, but only that the shipping was prevented by force majeure—namely, by the action of the rebels. This hindrance was a valid excuse according to French law, but not according to English law; hence, in an English Court, it could not be a valid defence for non-performance of an English contract. If the shipment had been a violation of French law this would apparently have been a valid excuse in an English Court for the non-shipment of the cargo—i.e., the non-performance of the contract." That statement as to the law applies to the present case. If a contract is made in England the basis of which involves the doing of some act in a foreign country, and that act becomes either illegal by the law of that country, or the performance of which is permitted only upon the payment of a tax, then even though the contract is an English contract yet the performance of that part is excused which the foreign Legislature has either forbidden or has allowed its performance only upon payment of the tax. In *Delage* v. *Nugget Polish Co.* (2) an English company undertook to pay to a foreigner residing abroad, from whom they had acquired a secret process, 8 per cent. on the gross receipts from the sales for a number of years, and it was held that the company had rightly deducted income tax from the amounts payable under the agreement.

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(1) (1800) 1 East, 6.
(2) (1890) 25 Q. B. D. 399.
(3) [1898] A. C. 349.
(4) [1897] 1 Ch. 911.
(5) [1909] 1 K. B. 7.
(6) (1884) 12 Q. B. D. 589.

(1) (1884) 12 Q. B. D. 589.

(2) (1905) 92 L. T. 682.

When money is lent to a company carrying on business in a foreign country the lender runs the risk of being subject to the fiscal legislation of that country. It is true that the payments of interest had to be made in this country, but that obligation could only be carried out by sending money from the United States, and would be subject to the fiscal legislation of that country as a condition of remitting the money. If the plaintiffs had to go to the American Courts to enforce payment of the interest the payment of the 5 per cent. less tax would be held to be a good discharge. The substantive rights of the parties are not affected by clause 27. The English Courts will have regard to the fact that the railway company is an American company, the defendants are merely guarantors, and that the money has to come from America and is subject to the fiscal legislation of the United States Government. In *Spiller* v. *Turner* (1) an English company, with English stockholders, carried on business in Australia, but was not incorporated there, and therefore an English contract made between the company and its English stockholders could not be affected by Australian legislation. Those facts are very different from the present case, and therefore that case does not apply.

Leslie Scott K.C. in reply. Sects. 102 and 103 of the Income Tax Act, 1842, expressly provide that a person who is liable to pay yearly interest of money may make a deduction therefrom in respect of income tax, and that such deduction shall be equivalent to payment and be a discharge pro tanto. Without that provision the deduction of income tax would not be equivalent to payment. There is no similar provision with regard to the deduction of foreign income tax.

The comment on *Jacobs* v. *Crédit Lyonnais* (2) in the note on p. 554 of Dicey's Conflict of Laws goes further than the authorities warrant. In the other cases cited in the note the illegality affected both parties. Here there is no question as to illegality. *Delage* v. *Nugget Polish Co.* (3) is distinguishable. If the 8 per cent. of the gross receipts was

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(1) [1897] 1 Ch. 911.

(2) 12 Q. B. D. 589.

(3) 92 L. T. 682.

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an annual payment within the Income Tax Acts, then the English Courts were bound under s. 103 of the Act of 1842 to enforce the deduction of income tax.

Cur. adv. vult.

1919. Dec. 9. SANKEY J. read the following judgment: In this case the plaintiffs advanced a sum of 500,000*l.* to an American railway company known as the Tonopah and Tidewater Railroad Company, who agreed to pay interest thereon in London at the rate of 5 per cent. The rights of the parties are regulated by an indenture dated the 24th day of November, 1905, made between the railroad company, the defendants, and the plaintiffs, in pursuance of which the defendants guaranteed the payment of the interest as follows. [His Lordship read clauses 4, 8 and 27 of the deed of trust and continued :]

Subsequently, in the years 1916 and 1917 the United States of America passed certain Income Tax laws, and the point at issue in this case is whether the railroad company are entitled to deduct the amount they have paid for income tax to the United States Government from the sums they agreed to pay to the plaintiffs for interest, it being contended on their behalf that the company was and is a corporation incorporated in America and subject to and bound by the said Acts and entitled thereunder to deduct and withhold tax at the rate of 2 per cent. from the payment of the interest mentioned.

No evidence was called before me, and the facts were not disputed, the question of liability alone being argued. It is only necessary to reiterate (1.) That the contract and the rights of all persons claiming thereunder are to be regulated by the law of England; and (2.) That the sum due for interest is payable in London.

It was urged on behalf of the plaintiffs that they are entitled to succeed upon the ground that payment of the 5 per cent. mentioned in the contract is not discharged by the payment to them of a smaller sum in England and payment of the balance to the United States of America taxing authorities.

Now it may be stated as a general proposition of English law that an agreement by A. to pay B. a certain sum is not discharged by the payment to B. of a sum of less amount and the payment to C. of the balance, unless (1.) this position is created by statute or common law, or (2.) by stipulation express or implied between the parties.

As to (1.). Is the position taken up by the defendants created by statute or common law ? It is provided by ss. 102 and 103 of the English Income Tax Act of 1842, that where a person is under liability to pay yearly interest of money he may make a deduction therefrom in respect of income tax and "shall be acquitted and discharged of so much money as such deduction shall amount unto, as if the amount thereof had actually been paid unto the person to whom such payment shall have been due and payable." In other words there is an express Act of Parliament which permits payment to the English Income Tax authorities to be a discharge pro tanto of the debt which a person owes in respect of yearly interest to another. There is no Act of Parliament which allows payment of income tax to another country to be reckoned as a discharge.

As to the common law, as far back as 1800 it was laid down by Lord Kenyon C.J. in *Smith* v. *Buchanan* (1) that "it is impossible to say that a contract made in one country is to be governed by the laws of another." In that case it was held that a discharge in the state of Maryland under a commission of bankrupt is not a bar to an action for a debt arising in England against the bankrupt by a creditor a subject of this country, for, as Lord Kenyon said, "it might as well be contended that if the State of Maryland had enacted that no debts due from its own subjects to the subjects of England should be paid, the plaintiff would have been bound by it." In Story's Conflict of Laws, 8th ed., p. 488, s. 342, that learned author says : "A discharge of a contract by the law of a place where the contract was not made, or to be performed, will not be a discharge of it in any other country." In the case of *Spiller* v. *Turner* (2) the facts were as follows : An English company, which carried on business in a colony,

(1) 1 East, 6, 10.

(2) [1897] 1 Ch. 911.

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passed resolutions under which a class of guaranteed preference stockholders became entitled to a cumulative payment of interest at the rate of 6 per cent. per annum in priority to the other stockholders. By a subsequent Act of the colonial Legislature a duty, in the nature of income tax, was imposed on all dividends or interest paid out of assets in the colony to the members of companies carrying on business therein, and it was declared that the duty payable in respect of the amount received by any member should be a debt due by him to the Crown. It was held by Kekewich J. that the contract between the preference and ordinary stockholders being an English contract, the rights under it of preference stockholders, not domiciled in the colony, were not affected by the colonial Act, and that they were therefore entitled to their 6 per cent. without any deduction in respect of the colonial duty.

The learned counsel for the defendants relied strongly upon a note in Professor Dicey's Conflict of Laws, 2nd ed., p. 554, upon the well-known case of *Jacobs* v. *Crédit Lyonnais*. (1) It is to be observed however that in that case different circumstances existed from those in the present case. There the contract was to be performed by shipment by a French company at an Algerian port, an operation which was lawful by French law at the time the contract was made, although at the time for the fulfilment of the contract the performance was forbidden by such law. No circumstances of that character exist in the present case, and different considerations apply. Whilst it is the duty of an English Court to enforce an English Taxing Act, it is no part of its duty to enforce the Taxing Act of another country. I have therefore come to the conclusion that there is no statute and no principle of the common law which justifies the defendants in their refusal to pay.

As to (2.). Is there any stipulation express or implied between the parties upon which the defendants can rely to justify the position they have taken up? "It is open in all cases for parties to make such agreement as they please as to

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(1) 12 Q. B. D. 589.

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incorporating the provisions of any foreign law with their contracts. . . . . If a contract made in England by English subjects or residents, and upon which payment is to be made in England, has to be performed in part abroad, it might not be unreasonable to assume that the mode in which any part of it has to be performed abroad was intended to be in accordance with the law of the foreign country, and to construe the contract as incorporating silently to that extent all provisions of a foreign law which would regulate the method of performance, and which were not inconsistent with the English contract": per Bowen L.J. in *Jacobs* v. *Crédit Lyonnais.* (1) Now admittedly there is no express stipulation, and in my view the Court would not be justified in reading into this English contract an implication that the plaintiffs agreed that the provisions of an American Taxing Act should be enforceable against them in England. The implication is just the other way. The contract expressly provides that it shall be construed and that the rights of all persons claiming thereunder shall be regulated by the law of England. The railroad company agreed to be bound in all things by the jurisdiction of the English Courts, and that service of the writ upon the defendants in London should be deemed to be good and effectual service of the writ upon the railroad company. It is impossible to hold that a contract so expressed impliedly incorporates a right in the railroad company to deduct American income tax from the sums they have agreed to pay in London in accordance with English law.

In my opinion the plaintiffs' contention is correct, and they are entitled to judgment.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Maddison, Stirling and Humm.*
Solicitors for defendants: *Ashurst, Morris, Crisp & Co.*

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(1) 12 Q. B. D. 599, 604.

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[IN THE COURT OF APPEAL.]

ATTORNEY-GENERAL *v.* SOUTH WALES ELECTRICAL POWER DISTRIBUTION COMPANY.

Revenue—Stamp Duty—Issue of Loan Capital—"Funded debt"—Deferred Warrants in payment of Debenture Interest—Finance Act, 1899 (62 & 63 *Vict. c.* 9), *s.* 8.

A company being unable to pay the interest on its debenture stock, under the powers of a private Act, issued from time to time "deferred warrants" in payment of that interest. These warrants themselves bore interest and were payable, both as to principal and interest, after a specified date out of the first available funds of the company:—

Held, that the transaction was not an issue of "loan capital" nor the creation of a "funded debt" within the meaning of s. 8 of the Finance Act, 1899, and that the company was not therefore liable to the ad valorem stamp duty imposed by that section.

Decision of Rowlatt J. [1919] 2 K. B. 636 affirmed.

Appeal from the decision of Rowlatt J. (1) upon a special case stated by consent in an action by the Attorney-General as informant, claiming duty and penalties under s. 8 of the Finance Act, 1899.

The facts are fully stated in the report in the Court below.

Shortly stated they were as follows:—

The defendant company was incorporated by a private Act in 1900. By a private Act passed in 1906, which recited that the company had issued debenture stock amounting to 200,000*l.*, the company was empowered to create and issue prior lien debenture stock, bearing interest at five per cent. and not exceeding in amount 500,000*l.*, which should both as to principal and interest be a first charge, in priority to any mortgages, debentures or debenture stock issued or to be issued and the interest thereon, upon the general undertaking of the company. Sect. 11 of the Act of 1906 provided that the interest on the company's existing 200,000*l.* debenture stock should not for a certain period be paid in cash, but should be paid and satisfied by the issue to the holders of that debenture stock half-yearly of deferred warrants for the amount of the interest, the warrants themselves carrying interest at the rate of five per cent. per annum, and being payable both as to the principal and interest thereof out of the first available funds of the company after a specified date, subject to prior payment of all interest on the prior lien debenture stock.

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(1) [1919] 2 K. B. 636.

The company issued three series of these deferred warrants, the first under the Act of 1906, the second under that Act, and another Act of 1908 which extended the company's powers. The third series was issued without statutory authority and amounted to an obligation undertaken by the company by virtue of its inherent powers. In the case of the first series, issued under the Act of 1906, payment of the interest was postponed until the year 1909. In those issued under the second Act payment was postponed until 1910, the period being further extended for another year. With regard to those issued without statutory authority there was no period of postponement.

The company did not before the issue of the deferred warrants deliver to the Commissioners of Inland Revenue any statement of a proposed issue of loan capital or of the amount proposed to be secured by that issue; and the company had not paid any duty thereon under s. 8 of the Finance Act, 1899. (1)

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(1) Finance Act, 1899, s. 8, sub-s. 1: "Where any local authority, corporation, company, or body of persons formed or established in the United Kingdom propose to issue any loan capital, they shall, before the issue thereof, deliver to the Commissioners a statement of the amount proposed to be secured by the issue. (2.) Subject to the provisions of this section every such statement shall be charged with an ad valorem stamp duty. . . . ."

Sub-s. 5: "In this section the expression 'loan capital' means any debenture stock, county stock, corporation stock, municipal stock, or funded debt, by whatever name known, or any capital raised by any local authority, corporation, company, or body of persons formed or established in the United Kingdom, which is borrowed, or has the character of borrowed money whether it is in the form of stock or in any other form, but does not include any county council or municipal corporation bills repayable not later than twelve months from their date or any overdraft at the bank or other loan raised for a merely temporary purpose for a period not exceeding twelve months."

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Rowlatt J. held that the transaction was not an issue of "loan capital" nor the creation of a "funded debt" within s. 8 of the Finance Act, 1899, and that the company was not liable to duty.

The Crown appealed.

T. H. Parr and *R. P. Hills* (*Sir Gordon Hewart A.-G.* with them for the Crown). In order to establish their case the Crown must show (1.) that there was a proposal to issue, and (2.) that there was an issue of "loan capital." There may be an issue of loan capital although the company gets no additional money at all: *Attorney-General* v. *Regent's Canal and Dock Co.* (1) In that case Collins M.R. said: (2) "In this case, though no money has been drawn from the public, the effect of the Act is to create a new stock in the hands of persons who did not hold it before, and, within the meaning of s. 8 of the Finance Act, 1899, the company did issue, and therefore must have proposed to issue, loan capital, and they thereby brought themselves within the obligation imposed by the section to pay the duty claimed."

That case shows that a conversion of stock may constitute a new issue of capital. See also *London and India Docks Co.* v. *Attorney-General.* (3)

It is submitted that this transaction constitutes both a "funded debt" and the raising of capital "which is borrowed, or has the character of borrowed money."

The position of the holders of these warrants is entirely changed. Their right to payment of the interest is gone. The warrants create a new and a different obligation. They give no charge on the undertaking and a receiver could not be appointed in case of default in payment. The debt for interest stands converted into a principal debt bearing interest. It is in effect a new borrowing. If not a "funded debt," it has "the character of borrowed money" within the definition of "loan capital" in s. 8, sub-s. 5.

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(1) [1904] 1 K. B. 263.

(2) Ibid. 269.

(3) [1909] A. C. 7, 12; affirming the decision of the C. A., which affirmed that of Walton J., 95 L. T. 536.

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Holman Gregory K.C. and *Trevor Lewis* for the respondents were not called upon to argue.

Dec. 10. LORD STERNDALE M.R. (after stating the facts and reading the material sections of the Finance Act, 1899). The question is whether the transaction in this case comes within the sections and sub-sections which I have read.

In the first place, in order to come within them it must be an issue of loan capital and in order to be an issue of loan capital it must be an issue of capital which comes within the definition of loan capital as given in sub-s. 5. Passing by for the moment the question of funded debt, it must be debenture stock, county stock, corporation stock, or municipal stock. It is obvious on the face of it that it is none of those, and if it is not one of those, then it must be capital raised which is borrowed, or has the character of borrowed money. This transaction seems to me to be wanting in several particulars in order to bring it within that definition. In the first place I think it is not capital at all; it is not capital raised at all. It is a mere provision for the payment of overdue interest by postponing the payment in consideration of paying interest upon the overdue amount. That is not raising capital. But it must also be capital which is borrowed or has the character of borrowed money. Again there is no money borrowed here nor has this transaction the character of borrowed money. You do not borrow money by postponing the payment of your debt and agreeing to pay interest upon it, and therefore it seems to me to be quite clear when looked at as a matter of fact, as we have to look at it, that this issue of warrants does not come within the definition of loan capital, unless it be a "funded debt," which I passed over for the moment in dealing with the rest of the section.

It has been rightly said that there is no definition in law of "funded debt," and I do not intend to attempt to give one which is in any way exhaustive; I merely intend to deal with the expression "funded debt" so far as is necessary for the purpose of this case. I did take the trouble to see

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what definitions were given for the general public in the best dictionaries and I found this definition of "fund" as a verb: "to provide a fund, hence to convert a floating debt into a more or less permanent debt at a fixed rate of interest." I also found the following definition of "funded": "That which has been made part of the permanent debt of the State with provision for regular payment of interest at a fixed rate." Of course, this definition overlooks the fact that it need not be a debt of the State at all; it may be a debt of a company as well as that of the State.

I do not mean to say that those definitions are exhaustive or complete in every respect, but I think they are substantially correct, and at any rate sufficiently substantially correct for the purposes of this case.

There must be something of the operation which is mentioned in that definition of the word "funded"; there must be a making of something into a permanent debt with provision for regular payment of interest at a fixed rate, and when once we have arrived at the fact, as in my opinion we have in this case—namely, that this was a mere postponement of the payment of overdue interest on condition of paying interest on that overdue interest, what is called a warrant, which sets out the right to payment at a postponed date with the specified interest—we have arrived at something which does not come within any definition that can be framed of "funded debt." It is not converting a floating debt of any sort into a permanent or long-term debt; it does not in any way, it seems to me, come within that expression.

Attorney-General v. *Regent's Canal and Dock Co.* (1) seems to me to be entirely different in its facts. It does establish this, that a company may issue loan capital without thereby getting any pecuniary advantage, any additional money. But what took place in that case was this: the company had several debenture stocks bearing interest at varying rates and they wished to substitute for those stocks one debenture stock carrying interest at the lowest of the rates of the existing debenture stock, and of course they wanted to do

(1) [1904] 1 K. B. 263.

that without prejudicing the amount that was received by the holders of the original debenture stock. It becomes obvious at once that if that were to be done and the holders of debenture stocks were to receive the same amount, there would have to be at any rate a nominally larger capital upon which the lower rate of interest was to be paid. In order to carry that out the company cancelled their existing debenture stocks, and issued another debenture stock nominally of a larger amount and bearing interest at the lowest rate which the existing stocks bore. That is quite a different transaction. What was done in that case may very well be looked at as a payment off of the original debenture stock and a reborrowing on different terms from the holders of the new debenture stock. The new debenture stock was, as I have said, of a larger amount and bore interest in some instances at a different rate. There was therefore an issue of an entirely different stock, and, it seems to me, it was held quite rightly that that was an issue of loan capital. *London and India Docks Co.* v. *Attorney-General* (1) is a similar case with this difference: Walton J. there pointed out that in that case the debenture stock was not cancelled but all the holders of the original debenture stock had to give up their certificates in respect of that stock in order to obtain the new stock which was issued by the company, and therefore for all practical purposes it is exactly the same as if the original stock had been extinguished as it was in *Attorney-General* v. *Regent's Canal and Dock Co.* (2) This case seems to me to be on quite a different footing. We have to deal with this on its own facts, and so dealing with it I think there is no ground for charging this company upon this transaction as upon an issue of loan capital. I think Rowlatt J.'s judgment was right and must be affirmed with costs.

Atkin L.J. I agree. I think this case is really determined by a consideration of the nature of the transaction. When these deferred warrants are looked at it is found that what in fact was done was this: By the original Act of the

(1) [1909] A. C. 7.
(2) [1904] 1 K. B. 263.

company of 1906, giving them power to issue their prior lien debentures, the company also took power for three years from 1906 to postpone their obligation to pay interest to the holders of their existing debenture stock, and they did that by issuing certificates for the interest due each half-year, carrying interest from the date at which the interest on the existing debenture stock became payable. It is to be noticed that the effect of the certificates was to create obligations upon the company of varying length, getting shorter each half-year, so that whereas the first payments of interest for the first-half year would be postponed for three years, for the second they would only be postponed for two and a half years, and so on until you get to the last payment which would only be postponed for six months, and when the period fixed in the first Act, January 1, 1909, arrived there would be no postponement at all.

Then the second Act was passed in 1908 which lengthened the period for each certificate issued up to that date by one year, and entitled the company in respect of certificates issued after the passing of that Act to postpone payment until 1910. It had precisely the same effect. The certificates were of varying length shortening in the series year by year, and in each case the payment was not a precise payment to be made on a particular date, but a payment to be made out of the first funds available after that date, thereby introducing another element of uncertainty, and, so far as I can see, not postponing the obligation on the company to pay until funds were available for the payment of all the certificates. That is a question which I do not propose to decide, but it looks to me at the present moment as though there might very well be a scramble for the available funds amongst the holders of the different certificates. When the statutory powers to issue certificates were exhausted the company took upon itself to issue further certificates of a like character, and those certificates do not postpone payment for any deferred time at all; they are merely certificates by which the company promise to pay out of their first available funds, which might come, I suppose, to-morrow or might not come till the Greek Kalends, at any rate for quite an indefinite period.

Now that being the position of things it is said that within the words of the Act which, as Walton J. said, are not in the language which is used by every-day people, the company has proposed to issue capital raised which is borrowed or has the character of borrowed money. It appears to me that the true answer to that contention is that this is not capital raised by the company. The postponement of an obligation to pay interest for short periods of an indefinite nature, such as these are, could not in any sense be said to be the raising of capital. It is also, to my mind, quite plain that it is not raising capital which is borrowed, because this money was not borrowed, and to postpone a debt which is not a debt for money lent does not appear to me to be borrowing money, nor in any sense the equivalent of borrowing money.

But has it the character of borrowed money? I do not propose to decide what that means or may mean under general circumstances. It may be that if a company were to issue something which was in the nature of capital, that is to say were to issue a series of debenture bonds in order to satisfy its existing debts, even though they were not debts incurred in respect of money borrowed, that might be raising capital which has the character of borrowed money. I do not propose to decide that, but as I have said in this particular case it appears to me this is not a raising of capital at all.

I think the same considerations deal with the suggestion that this is a proposal to issue a funded debt. To my mind a funded debt involves at any rate this conception—namely, the substitution for short obligations of a series of obligations more or less permanent and uniform in character—and it appears to me that this series of postponements for varying short periods coupled with the indefinite attributes which attach to them, cannot in any sense be said to be the equivalent of funding these obligations for the payment of interest.

For these reasons I agree that the decision of the learned

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judge below is right, and I think this appeal should be dismissed.

Younger L.J. I am of the same opinion. I think the true nature of this transaction between the company and the holders of this debenture stock is quite plainly disclosed in the second paragraph in the special case, setting forth the relevant provisions of the Act of 1906, which, with the consent in writing of three-fourths in value of the holders of the existing debenture stock of the company, was passed for two purposes, as is set forth in that paragraph: first, to enable the company to create and issue half a million of prior lien debenture stock; and secondly, in order obviously to make that security one which subscribers would be willing to accept, to require the holders of the existing debenture stock as it is stated in the preamble, to submit—these are the words which are important—"to the postponement of interest on the existing debenture stock."

That preamble is followed by s. 11, which provides that in the event of the company creating and issuing the prior lien debenture stock the interest on the existing 200,000*l.* five per cent. debenture stock is not for the period prescribed by the section to be paid in cash, but is to be satisfied in the manner set forth in that section, namely, by the issue of these warrants with reference to which the present question arises.

Now it appears to me in these circumstances that with reference to the statute in truth and in fact nothing more thus intended and achieved than this was done under this transaction than this, that there was a statutory moratorium for the instalments of interest upon the debenture stock which the holders of that debenture stock were compelled to submit to, the terms being that these instalments of interest should not be payable until the expiration of the moratorium period. That was a period of three years. The Act of 1908 extended the period for a further term of one year. Subsequent to the expiration of that Act of 1908 the company went on issuing warrants in respect of subsequent instalments of interest without statutory authority. But it is, I think, plain again, if one looks at the actual transaction, that that which had under the two statutes been a statutory moratorium became, after the statutes had ceased to operate, a conventional moratorium, under which the holders of the debenture stock agreed—and they could not have been so compelled to accept unless they had agreed—that the interest which they were entitled to demand under the terms of their debenture stock should again be deferred in accordance with the terms of the warrants which were issued by the company in respect of it.

Now that being so it appears to me that it would be straining the language of the statute to an impossible point to suggest that this statutory moratorium, or, if you like, forbearance to sue for money that had become due, was either loan capital or the funding of a debt. I agree entirely with the analysis of these two expressions which the Master of the Rolls has given in his judgment. I would only add this with reference to the observations he made upon the expression "loan capital." It is, I think, impossible if one looks at the terms and provisions of the Act of 1906 to suppose that it was contemplated by the Legislature, when it constituted what I have called this statutory moratorium, that there was to be made to the holder of any of these warrants even a notional payment of interest which was in turn to be re-lent by him to the company. It is quite plain I think from the terms of the statute that the payment of that interest, either notional or otherwise, was the last thing that was in the contemplation of the Legislature, and the elimination of that as a possible element from the transaction appears to me completely to distinguish this case from *Attorney-General* v. *Regent's Canal and Dock Co.* (1), where Mathew L.J., in dealing with the transaction which has already been described by the Master of the Rolls, says that in substance it might be described in this way: "The operations indicated by the Act have been carried out, and it seems to me that the position is the same as it would have been had the originalde bentures

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(1) [1904] 1 K. B. 269.

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been paid off and the amount required borrowed again on the terms specified in the Act."

It appears to me impossible to say that the transaction authorized by this Act could be described as in substance or effect a payment of the interest and a re-lending of it to the company on the terms of the warrant.

I would only make one further observation. It is not suggested, and of course it would not be suggested, by the Crown that the extension of the period of the original moratorium, which was effected by the Act of 1908, was a fresh issue of capital. But I am bound to say that although that Act did not require in respect of the extended period the issue of a fresh warrant, I can see no difference in principle between the extension of the period for one year, which was effected by that Act in respect of the warrants issued under the Act of 1906, and the postponement for three years of the interest which was due at the passing of the Act of 1906 and accrued during its continuance. If the one was "loan capital," so, I should think, was the other.

For these reasons I am of opinion that the transaction is not an issue of "loan capital" and that this appeal ought to be dismissed.

Solicitor for the Crown: *Solicitor of Inland Revenue.*

Solicitors for the company: *Vizard, Oldham, Crowder & Cash, for Spencers & Evans, Cardiff.*

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[IN THE COURT OF APPEAL.]

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INLAND REVENUE COMMISSIONERS *v.* GITTUS.

Revenue—Excess Profits Duty—Set Off—Loss in Business during accounting Period—Change of Ownership in Business during that Period—Extent of Set Off—Finance (No. 2) Act, 1915 (5 *&* 6 *Geo.* 5, *c.* 89), *s.* 38, *sub-s.* 3; *s.* 40, *sub-ss.* 1, 2; *Sched.* 4, *Part II., r.* 5.

In an accounting period, and at a time coming respectively within the Finance (No. 2) Act, 1915, Part III., s. 38, sub-s. 3, and Sched. 4, Part II., r. 5, a loss had been sustained in a business, and there had also been a change of ownership of the business, the appellant having become its owner. An application was made under Sched. 4, r. 5, that Part III. of the Act should apply as if the business had not changed ownership. As against the excess profits duty payable by the appellant in respect of the succeeding accounting period it was admitted that he was entitled under s. 38, sub-s. 3, to set off the proportion of the loss applicable to that part of the accounting period in which the loss occurred during which he was himself the owner of the business; but he claimed to be entitled to set off also the proportion of the loss applicable to the part of the period during which his predecessor was the owner:—

Held, that the appellant was not entitled, under s. 38, sub-s. 3, to set off the proportion of the loss applicable to the time of his predecessor's ownership of the business, first, because that sub-section, assuming that its operation was not affected by the application under r. 5, only entitled a person to set off a loss which was personal to himself; and, secondly, because that sub-section, although included in Part III. of the Act, was not by virtue of the application under r. 5 in regard to that part of the Act made so to apply as if the business had not changed ownership, so as to entitle the appellant to set off that proportion of the loss, inasmuch as the only provisions of that part of the Act, which an application under r. 5 caused so to apply, were those which related to the pre-war standard, and the sub-section in question was not one of those provisions.

Decision of Rowlatt J. [1919] 2 K. B. 766 affirmed.

APPEAL from the decision of Rowlatt J. (1) upon a case stated by Commissioners for the General Purposes of the Income Tax Acts for the division of Staincross in the county of York.

For many years before 1915 Mark William Gittus carried on the business of a wagon builder at Penistone, and his son W. B. Gittus was employed by him to assist him in the

(1) [1919] 2 K. B. 766.

business at a salary, but was not a partner in the business. Mark W. Gittus, by his will, after making certain specific gifts of real property, devised and bequeathed all the residue of his real estate and all his personal estate, subject to the payment of his debts and funeral and testamentary expenses, to his son W. B. Gittus. Mark W. Gittus died on September 6, 1915, and W. B. Gittus thereupon continued to carry on the same business on his own account, without any break or interruption, under the name of William Gittus & Son.

During the accounting period from October 1, 1914, to September 30, 1915, the business suffered a loss, making a deficiency as compared with the pre-war standard of profits of 1543*l.* 6*s.*, of which sum 142*l.* 16*s.* was the proportion applicable to the period from September 6, 1915, to September 30, 1915, the balance of 1400*l.* 10*s.* being the proportion applicable to the period from October 1, 1914, to September 6, 1915.

The Commissioners of Inland Revenue made an assessment upon W. B. Gittus for excess profits duty under the Finance (No. 2) Act, 1915 (1), for the accounting period from October 1,

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(1) FINANCE (No. 2) ACT, 1915.
"*Part III.—Excess Profits Duty.*"
Sect. 38: "(1.) There shall be charged, levied, and paid on the amount by which the profits arising from any trade or business to which this part of this Act applies, in any accounting period which ended after the fourth day of August, nineteen hundred and fourteen, and before the first day of July, nineteen hundred and fifteen, exceeded, by more than two hundred pounds, the pre-war standard of profits as defined for the purposes of this part of this Act, a duty (in this Act referred to as 'excess profits duty') of an amount equal to fifty per cent. of that excess. . . . .

"(3.) Where a person proves that in any accounting period, which ended after the fourth of August, nineteen hundred and fourteen, his profits have not reached the point which involves liability to excess profits duty, or that he has sustained a loss in his trade or business, he shall be entitled to repayment of such amount paid by him as excess profits duty in respect of any previous accounting period, or to set off against any excess profits duty payable by him in respect of any succeeding accounting period, such an amount as will make the total amount of excess profits duty paid by him during the whole period accord with his profits or losses during that period.'"

Sect. 40: "(1.) The profits arising from any trade or business to which this part of this Act applies shall be separately determined for the purpose of this part of this Act, but shall be so determined on the same principles as the profits and

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1915, to September 30, 1916. In so doing they found that the net amount of the excess profits of the business in that period was 707*l.*, and that the excess profits duty of an amount equal to 60 per cent. of those excess profits would be 424*l.* 4*s.*; as against that amount of duty they allowed, under s. 38, sub-s. 3, and Fourth Schedule, Part II., r. 5, of the Act, a set off of the above-mentioned sum of 142*l.* 16*s.*, but not of the above-mentioned balance of 1400*l.* 10*s.*; and they accordingly charged W. B. Gittus in respect of excess profits duty under the Act with 281*l.* 8*s.*, being the aforesaid 424*l.* 4*s.*, less the aforesaid 142*l.* 16*s.* set off against it. The assessment

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gains of the trade or business are or would be determined for the purpose of income tax, subject to the modifications set out in the First Part of the Fourth Schedule to this Act and to any other provisions of this Act. . . .

"(2.) . . . . The provisions contained in the Second Part of the Fourth Schedule to this Act shall have effect with respect to the computation of the profits of a pre-war trade year, and the provisions contained in the Third Part of the Fourth Schedule shall have effect with respect to the ascertainment of capital for the purposes of this part of this Act. . . . ."

Sect. 45: . . . . "(2.) The duty may be assessed on any person for the time being owning or carrying on the trade or business or acting as agent for that person in carrying on the trade or business, or, where a trade or business has ceased, on the person who owned or carried on the trade or business or acted as agent in carrying on the trade or business immediately before the time at which the trade or business ceased, and when there has been a change of ownership of the trade or business, the Commissioners of Inland Revenue may, if they think fit, take the accounting period as the period ending on the date on which the ownership has so changed and assess the duty on the person who owned or carried on the trade or business or acted as agent for the person carrying on the trade or business at that date."

Fourth Schedule.

"*Part I.—Computation of Profits.*"

. . . . . .

"*Part II.—Pre-War Standard.*"

. . . . . .

"(5.) Where since the commencement of the three last pre-war trade years a trade or business has changed ownership, the provisions of this Part of this Schedule shall apply as if a new trade or business had been commenced on the change of ownership, except in cases when the taxpayer makes an application that the provisions of Part III. of this Act and this Schedule should apply as if the trade or business had not changed ownership, but in that case such modifications (if any) shall be made in the application of this Schedule as may be necessary to make the basis on which the profits standard is computed the same as that on which the profits of the accounting period are computed."

"*Part III.—Capital.*"

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was made in the name of "William Gittus & Son, W. B. Gittus (sole)" and its amount was set forth as follows:—

Net Amount of excess Profits.	Rate.	Assessed.	Set Off.	Payable.
707*l.*	60%	424*l.* 4*s.*	142*l.* 16*s.*	281*l.* 8*s.*

If W. B. Gittus was entitled to set off against the amount assessed the above-mentioned balance of 1400*l.* 10*s.* also, he would have been entirely relieved from excess profits duty for the last-mentioned accounting period. The respondent appealed against the assessment to the General Commissioners for the division.

On the hearing of that appeal the above-mentioned facts were proved or admitted, and the General Commissioners decided that there had been a change of ownership of the business, and that Part III. of the Act of 1915, and the Fourth Schedule thereto, should apply as if the business had not changed ownership in accordance with the Fourth Schedule, Part II., r. 5, and that the amount of the assessment on that basis should, in the absence of agreement between the parties, be determined by the General Commissioners at a subsequent meeting.

On March 7, 1918, no agreement having been arrived at, the case again came before the General Commissioners, when it was admitted that it should be decided by them on the footing that in so far as provided for in the Fourth Schedule, Part II., r. 5, of the Act of 1915, the provisions of Part III. of that Act and the Fourth Schedule thereto should apply as if the trade or business had not changed ownership.

It was contended on behalf of W. B. Gittus that the relief granted by s. 38, sub-s. 3, and the Fourth Schedule, Part II., r. 5, applied to the business, and that he was entitled to set off the loss suffered by his predecessor.

It was contended on behalf of the Commissioners of Inland Revenue that the relief granted by s. 38, sub-s. 3, applied only to the person suffering the deficiency or loss, and that no part of the deficiency above mentioned applicable to the period from October 1, 1914, to September 6, 1915, could be used by W. B. Gittus to obtain relief under that section in respect of the accounting period from October 1, 1915, to September 30, 1916, and, further, that r. 5 only had reference to the pre-war standard.

The General Commissioners decided in favour of W. B. Gittus, holding that he was entitled to set off the deficiency or loss applicable to the period from October 1, 1914, to September 6, 1918, against any liability for excess profits duty for the accounting period from October 1, 1915, to September 30, 1916, and they discharged the assessment.

The Inland Revenue Commissioners appealed upon the case stated, the only question for the Court being that raised by the contention of the parties, namely, whether the relief under s. 38, sub-s. 3, and Fourth Schedule, Part II., r. 5, applied to the business or was confined to the person suffering the loss.

Rowlatt J. held that W. B. Gittus was not entitled under s. 38, sub-s. 3, to set off against the duty the proportion of the loss applicable to the time of his predecessor's ownership of the business, first, because that sub-section, assuming that its operation was not affected by the application under r. 5, only entitled a person to set off a loss in his business which was personal to himself; and, secondly, because that sub-section, although included in Part III. of the Act, was not by virtue of the application under r. 5 in regard to that part of the Act made to apply as if the business had not changed ownership, so as to entitle W. B. Gittus to set off that proportion of the loss, inasmuch as the only provisions of that portion of the Act which an application under r. 5 caused so to apply were those which related to the pre-war standard, and the sub-section in question was not one of those provisions.

Against this decision W. B. Gittus appealed.

The appeal was heard on December 10, 11, and 12.

Maugham K.C. and *Latter* for the appellant. By the Finance Act, 1915, s. 38, sub-s. 3, provision is made for the averaging of excess profits duty leviable in respect of successive accounting periods of a business. Where there has been, as here, a change of ownership of the business during an accounting period, the Crown contends that the right to average is personal to the owner at the time of the assessment, and that the new owner has no right to set off against duty payable by him in respect of a succeeding accounting period losses sustained in the business during the ownership of his predecessor. It is submitted that the right given by s. 38, sub-s. 3, is not purely personal. The duty is levied on the business or trade, though it is payable, no doubt, by the owner for the time being. The averaging clause is not confined in its operation to cases where the ownership of a business is continuous. The owner for the time being is entitled to be treated as a continuous owner. If that be not the right construction of s. 38, sub-s. 3, then it is submitted that it must be read together with r. 5 of Part II. of the Fourth Schedule to the Act, which provides that where a trade or business has changed ownership since the commencement of the last three pre-war trade years the taxpayer may make an application (which has been made in this case) that the provisions of Part III. of the Act and of the Fourth Schedule shall apply as if there had been no change of ownership. Under s. 45, sub-s. 2, where there has been a change of ownership the Commissioners may, if they think fit, take the accounting period as the period ending on the date on which the ownership has so changed, and assess the duty upon the person who owned or carried on the business at that date. The two sections work together and provide a remedy for a wrong which would otherwise exist. By the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 19, "person" includes any body of persons corporate or unincorporate. In *Scottish Shire Line, Ld.* v. *Lethem* (1), where a company had sold its business to a new company consisting partly of the same shareholders, it was held that the new company was entitled to deduct from its profits chargeable with income tax the balance of deductions for wear and tear which would have been allowable to the old company. Lord

(1) 1912 S. C. 1108; 6 Tax Cas. 91.

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Salvesen there said (1) that the contrary argument would involve this, that an entirely immaterial change in a partnership, either by the death of a partner, however small his interest, or the assumption of a new partner, entitled to a share of the profits however fractional, would deprive the remaining partners of the benefit of a deduction to which they were otherwise entitled ; and that he could not imagine that that was intended by the Legislature. It is contended by the Crown that the operation of s. 38, sub-s. 3, is not affected by the Fourth Schedule, Part II., r. 5, because Part II., both from its heading and its whole tenor, applies only to the ascertainment of the pre-war standard of profits, and to no other matter. But the schedule is as much part of the statute, and is as much an enactment as any other part of the Act: *Attorney-General* v. *Lamplough* (2) ; and the provisions of the schedule are not to be treated as having less weight than those of the Act : *Colquhoun* v. *Brooks.* (3)

Where the words of a section extend beyond the subject-matter of the heading under which it is grouped they are not to be read as limited by that heading : *Fletcher* v. *Birkenhead Corporation.* (4) Sect. 41, which provides for adjustments for increased or decreased capital during an accounting period, shows how inartificial is the dividing line between the Act and the schedule. Rule 5 ought equally to have been in the Act. There are no watertight compartments shutting off the provisions of the Act from those of the schedule. Rule 5 cannot be confined in its operation to the particular subject-matter of that part of the schedule. The object and intention of the Act was to impose the tax upon the business as an entity. The Court will construe the Act so as to remedy an injustice. It was never intended to press more hardly upon small individual owners than upon companies which have a continuous existence. Moreover, the operation of r. 6 is not confined to the ascertaining of the pre-war standard. These provisions relate to all the purposes of Part III. of the Act.

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(1) 6 Tax Cas. 100.

(2) (1878) 3 Ex. D. 214, 229.

(3) (1889) 14 App. Cas. 493.

(4) [1907] 1 K. B. 205.

[YOUNGER L.J. I feel a difficulty as to cases of partnership.

Parr for the Crown. The Crown does not insist upon this view in such cases.]

[YOUNGER L.J. When does the change of ownership take place in the case of an executor ?]

That is another difficulty following upon the non-acceptance of the appellant's argument.

The principle of the taxation rests on the continuity of the business. What is dealt with by s. 38 is the profits of the trade or business. Sect. 39 again speaks of the business, and s. 40 is directed to the profits arising from the business and not the profits of the person. Sect. 41 refers to the capital of the trade or business and has nothing to do with the fixing of the pre-war standard. Sect. 45, sub-s. 2, merely gives power to assess the person for the time being carrying on the trade or business. The tax is a floating charge upon the business: *Robbins* v. *Inland Revenue Commissioners*. (1) Upon the construction of s. 38, sub-s. 3, it is submitted that the word "person" there means the "person owning or carrying on the business," as in s. 45, sub-s. 2. If that expression be substituted in s. 38, sub-s. 3, for the word "person," all difficulty disappears and the Act is made to work harmoniously. If application is made under r. 5 then all the provisions of Part III. of the Act and of the Fourth Schedule apply as if there had been no change of ownership.

Parr (*Sir Gordon Hewart A.-G.* and *R. P. Hills* with him) for the Crown. Two questions arise on this appeal. First, whether the appellant is within s. 38, sub-s. 3; and secondly, whether r. 5 of Part II. of the Fourth Schedule bring him within it. Sect. 38, sub-s. 3, is personal in tone and application. To adopt the suggested reading of the word "person" there would lead to confusion. It is impossible to regard the section as giving the relief claimed except to a person continuously carrying on the business. The crux of the case is the proper relation of the schedule to the Act. It is said that if an application is made under r. 5 then all the provisions of

(1) [1920] 1 K. B. 51.

Part III. of the Act are imported. Except for the purposes of computation of the pre-war standard that is not so. The words of the rule are clear and mean what they say.

It is said, further, that r. 6 points to something going beyond the ascertainment of the pre-war standard. It is submitted that it does not. Moreover we are only concerned with the meaning of r. 5. Sect. 45 of the Finance Act, 1916, carries the matter no further. As to the construction of the schedule, the rule is that where a schedule applied by the Act is limited to a particular purpose the Court ought not to extend its operation except for the strongest reason founded upon its language or implication therefrom. There is nothing here to justify its extension. The earlier Income Tax Acts divide into classes the various kinds of property to be taxed, and designate those classes as schedules, which strictly they are not. All that *Colquhoun* v. *Brooks* (1) decided was that s. 5 of the Income Tax Act, 1853, brings into play all the rules under the Act of 1842. That does not assist the argument. The object of s. 38, sub-s. 3, is to make the total amount of excess profits duty paid by the person who has carried on the business during the whole period accord with his profits or losses during that period. That is entirely personal. The successor in the business gets the pre-war standard of his predecessor. He is not allowed to calculate his profits on the previous losses of his predecessor. Sect. 38, sub-s. 3, is not applicable unless you can find provisions in the Act to bring it into operation. The only provision suggested is r. 5 of the Fourth Schedule which, it is submitted, does not have that effect.

Maugham K.C. in reply. A fair consideration of the whole Act justifies the view that what is assessed is the profits of a business. That business is a continuing entity. There is a provision in the schedule, which is part of the Act, which enables the successor in a business, which has changed hands, to say to the Commissioners when assessing his profits standard, "Put me in the position of my predecessor." There is no ground for levying increased excess profits duty upon a successor. The Crown is entitled to that amount of duty which the predecessor would have been liable to pay if he had remained the owner of the business, and no more. Sect. 38, sub-s. 3, is properly brought into operation in such a case.

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(1) 14 App. Cas. 493.

LORD STERNDALE M.R. This is an appeal from the judgment of Rowlatt J., who reversed the decision of the Commissioners. The question arises in this way: M. W. Gittus carried on business as William Gittus & Son. He had a son, the present appellant, but the son was not a partner. On September 6, 1915, M. W. Gittus died. He left a will under which his son was executor and residuary legatee, and under that will he became entitled to the business. On December 23, 1915, the Act with which we are dealing, the Finance (No. 2) Act, 1915, was passed, some months after the testator's death. The appellant was then assessed for excess profits duty, and the first year ending September 30, 1914, would be the first accounting period under the Act; the second ended on September 30, 1915, twenty-four days after the testator's death; the third ended on September 30, 1916. In the second period there was a deficiency on the pre-war standard of over 1500*l*. In the third period there was a profit which, if there were nothing to set against it, would make the appellant liable for excess profits duty to which he has been charged in this case.

The Crown have allowed a set off or deduction for the twenty-four days succeeding the testator's death, namely—from September 6, 1915, to September 30, 1915—and the appellant contends that it is wrong and that he is entitled to a deduction in respect of the whole of the deficiency in the second accounting period. If that be allowed, he would not be chargeable for any excess profits duty in the third period because the one would entirely wipe out the other.

The case has proceeded upon the footing of one or two matters which I must mention, and I think it is well to state them as accurately as possible, as it may be thought hereafter that they were not altogether in accordance with legal principles. The first is, the appellant is taken as having succeeded to the business immediately upon his father's death, and the change of ownership spoken of in the Act is taken as having occurred at that date, at the moment of the death. Now as he took the benefit of this business as residuary legatee, there may be—I do not say more than that now—a question whether in fact his ownership of the business did commence at that particular time or at some later date. I only mention it because I do not wish to be taken as deciding that that was right: I assume it for the purposes of this case, as it has been assumed throughout.

Then there is another matter that I ought to mention, and that is this: This appellant took the benefit, became the owner of the business, under a will, he succeeded his father in a business which his father, with his assistance, had previously carried on. But it is not contended that that puts the appellant in any different position than that of an independent purchaser who had bought the business upon September 6. No point has been made—I do not say whether it could have been made or not—that the position of a person taking under a will in the way that the appellant did is any different from that of an outside purchaser, if I may call him so, a person previously unconnected with the business, who simply comes in and buys it. I thought it well to state those facts, and having stated them I will now consider what the question before us is.

It is whether the appellant is right in saying that he is entitled to set off against his liability in the third accounting period the deficiency occurring almost entirely during the time of his predecessor in the second accounting period, so as to relieve him from the payment of any excess profits duty. That turns first upon the construction of s. 38, sub-s. 1, and sub-s. 3, of the Finance (No. 2) Act, 1915. [The Master of the Rolls read the material provisions of the section and continued:] As I understand that, it means this: If there has been a deficiency in what I may call the previous period and then a profit which otherwise would make the person carrying on the business liable to excess profits duty in a succeeding period,

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the loss sustained during the former period may be set off against the profit accrued during the latter period, and therefore there would be nothing payable. If the converse takes place, and in the former period there is a profit upon which excess profits duty has been paid, and in the latter period there is a loss, then the person carrying on the business is entitled to recover the amount of the excess profits duty or a portion of it which he has paid in respect of the former period. And what is said here is this: You must look at this business as a continuous whole, and although the person who is carrying it on has changed upon September 6, you must treat it, for the purposes of s. 38, sub-s. 3, as though the same person had been carrying on the business throughout. That is first argued upon the construction of the section.

Now I do not think that is the construction of the section, and I think it has been so clearly expressed by Mr. Justice Rowlatt that I may adopt the language that he has used. He says (1): "Taking that section alone, I think it clearly points to the case of an individual, and means that the loss in his business which a person shall be entitled to set off against the excess profits duty payable by him is a loss personal to himself. It is true that in a sense the excess profits duty is assessed upon a trade or business, a trade or business being the subject-matter in respect of which it is charged. The duty must, however, be assessed upon a person, and where, as in the present case, it appears that during the accounting period in which a loss has been sustained in the business the person assessed has become the person owning or carrying on the business or the agent for that person, it seems to me that the sub-section in question according to its true meaning distinctly provides that he is to be entitled to set off as against the duty payable by him in a succeeding year only so much of the loss as has been sustained by him as an individual, and no more."

I think that that is a correct exposition of the meaning of the section. Certainly, to give it the wider interpretation for which the appellant contends would be to do violence to the ordinary language. But it was argued that the section must be differently read and, to a certain extent, that was based upon some language which is used in s. 45, sub-s. 2, which says: "The duty may be assessed on any person for the time being owning or carrying on the trade or business." It was argued that where you find "person" in s. 38, sub-s. 3, you must read it, "The person for the time being carrying on the business" and when you find following that the pronouns "he" and "him" and so on, you are not to read those as in ordinary English as referring to the person who has been mentioned at the beginning of the sub-section, but you are to substitute for "he" and for "him" "the person for the time being carrying on the business"; and, in order to make it clear, you must read it as "the person carrying on the business for the time being, whether the person first mentioned in the section or not," so as to bring in somebody who is not the person first mentioned, and then you must read the material portion of the sub-section as follows: "The person carrying on the business for the time being shall be entitled to repayment of such amount paid by the person carrying on the business for the time being, whether himself or another person, as excess profits duty in respect of any previous accounting period or to set off against any excess profits duty payable by the person for the time being carrying on the business in respect of any succeeding accounting period such an amount as will make the total amount of excess profits duty paid by the person for the time being carrying on the business whether the same person as before-mentioned or not, during the whole period accord with his profits or losses during that period." I have never seen a section like it, and it seems to me that to put such an interpretation upon these words is quite contrary to the common use of language and ought not to be adopted.

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(1) [1919] 2 K.B. 776.

But another point is suggested which leads to greater difficulty. This Act has schedules dealing with various matters, and in the Fourth Schedule there are three parts. Part I. is headed "Computation of Profits"; Part II. is headed "Pre-war Standard"; and Part III. is headed, "Capital"; and s. 40, sub-s. (2) of the Act, provides that "The provisions contained in the Second Part of the Fourth Schedule to this Act shall have effect with respect to the computation of the profits of a pre-war trade year, and the provisions contained in the Third Part of the Fourth Schedule shall have effect with respect to the ascertainment of capital for the purposes of this Part of this Act."

It seems to me there are two principles or rules of interpretation which ought to be applied to the combination of Act and schedule. If the Act says that the schedule is to be used for a certain purpose and the heading of the part of the schedule in question shows that it is prima facie at any rate devoted to that purpose, then you must read the Act and the schedule as though the schedule were operating for that purpose, and if you can satisfy the language of the section without extending it beyond that purpose you ought to do it. But if in spite of that you find in the language of the schedule words and terms that go clearly outside that purpose, then you must give effect to them and you must not consider them as limited by the heading of that part of the schedule or by the purpose mentioned in the Act for which the schedule is prima facie to be used. You cannot refuse to give effect to clear words simply because prima facie they seem to be limited by the heading of the schedule and the definition of the purpose of the schedule contained in the Act. Those are the rules which I intend to apply to this case as well as I can.

Clause 5 of Part II. of the Fourth Schedule says this: "Where, since the commencement of the three last pre-war trade years a trade or business has changed ownership, the provisions of this part of this schedule shall apply as if a new trade or business had been commenced on the change of ownership, except in cases when the taxpayer makes an application that the provisions of Part III. of this Act and this schedule should apply as if the trade or business had not changed ownership."

There the draftsman has stopped. He has not gone on to say what is to happen in the event of such an application being made, but I shall assume, as has been assumed throughout, and I think must be assumed, that he means that such an application shall be granted, and then he proceeds: "but in that case such modifications (if any) shall be made in the application of this schedule as may be necessary to make the basis on which the profits standard is computed the same as that on which the profits of the accounting period are computed."

The contention is this, that as the application is, as stated in the clause, "an application that the provisions of Part III. of this Act and this schedule should apply," and as it is assumed that the application will be granted, all provisions of Part III. of this Act and this schedule then apply to the case of the person who has made the application, and that the necessary result of that is that he must be considered as being the same person who had been carrying on the business throughout the whole period which has been dealt with, and, as a necessary consequence of that, he must be entitled to the benefit of s. 38, sub-s. 3.

No doubt it is not absolutely clear. I do not know that anything is clear in this schedule—certainly the interpretation is not easy—but I cannot see any reason why it is necessary to extend that clause in the schedule beyond what I have called the prima facie object of the schedule, and I cannot see any reason why it should not be held, as Mr. Justice Rowlatt has held, that (1) "Rule 5, in saying that the provisions of Part III. of the Act and that schedule shall apply as if the trade or business had not changed ownership must mean that these provisions are to apply as if the trade or business has not changed ownership only to the subject-matter of Part II. of the schedule, that is, to the pre-war standard and to no other, subject-matter, and therefore that s. 38, sub-s. 3, does not operate in the present case."

That seems to me to be the ordinary meaning of the clause, although great difficulties—at any rate what were said to be great difficulties—were pointed out as arising from that construction, I do not think that considerations of such difficulties, if they exist, outweigh the ordinary meaning

(1) [1919] 2 K B. 778.

of the words. I do not say whether all the difficulties that were put to us as arising would arise or not, but assuming that they would, I cannot think that they are of sufficient force to oblige me to read the words of the clause in what I think is a non-natural sense, still less do I think that I am compelled to do so by the statement that the Crown has, in other cases, chosen to take a different view. I do not know whether they have or not, but if the advisers of the Crown have taken different views in different cases, it does not seem to me that that ought to influence the Court in arriving at the construction of the clause as best they can.

There is only one other matter that I wish to mention. It is said, at any rate even if that be so when you read clause 5 by itself, if you read clause 6 it becomes clear that clause 5 must have been intended to have an operation beyond that which I have mentioned. Clause 6 begins with a declaratory statement apparently. It is said the draftsman probably had in his mind some case, to which we have not been referred by name, or some practice under the Income Tax Acts, and he wished to declare that the practice under this Act should be the same, and in order to make things clear he put in clause 6. Persons' ideas of clarity no doubt differ; he may have made it absolutely clear to himself, but I frankly confess he has not made it absolutely clear to me. He seems to me to say this: There is a case which otherwise might be considered to be within clause 5. Clause 6 is therefore said to be a great qualification or modification of clause 5. I think it is to that extent. Then if you look at what he has done and provided with regard to that case which he has said shall not be within clause 5, you will see that he has gone beyond the prima facie operation of the section and has provided something that has nothing to do with the question of pre-war standard. It may be a question whether it is quite clear that he has done anything of the sort, but it does not seem to me that even if he has, or I ought to say even if the Act, in dealing with the case outside of the provisions of clause 5, has used words which have an operation beyond the prima facie operation of the section, that shows that that same wider operation is to be given to the cases which are within clause 5. Therefore I do not think that clause 6 really interferes with what I think is the right construction of clause 5.

For these reasons I think that Mr. Justice Rowlatt's decision was right and that the appeal must be dismissed.

ATKIN L.J. The question in this case turns upon the construction of some sections of an Act which undoubtedly is of an extremely complicated nature. I have some doubt, owing to the complicated nature of the legislation, whether I shall find myself able to express as clearly as I should desire the reasons which lead me to the conclusion that the decision of the learned judge is right. The first point to be considered is, I think, the construction of s. 38, sub-s. 3, and it appears to me that, reading that section without the light of any other section or schedule, it is tolerably plain that the benefit that is given by that section is confined to the actual losses or payments that have been made by the person who is seeking relief. The question arises in the case of a new owner of a business. The new owner of a business, as soon as he acquires it, may have lean years or he may have fat years, but whatever the years are, they are his and he takes the chance, and it appears to me that there is no reason for assuming that the Legislature meant him to have the benefit of the lean years or the fat years which his predecessor had enjoyed. The language of the sub-section is this: "(3.) Where a person proves that in any accounting period, which ended after the fourth day of August, 1914, his profits have not reached the point which involves liability to excess profits duty, or that he has sustained a loss in his trade or business." Going so far, it is quite plain that the sub-section is only applicable to the personal profit or personal loss of the person mentioned at the beginning. Then it proceeds: "he shall be entitled to repayment of such amount paid by him as excess profits duty." I do not think anything could very well be clearer. "Paid by him" in any grammatical construction must mean paid by the person who "proves that in any accounting period" and so on. It goes on to say: "or to set off against any excess profits duty payable by him"—that is the same person—"such an amount as will make the total amount of excess profits duty paid by him during the whole period accord with his profits or losses during that period." Anybody who tried to construe that section in its ordinary meaning would have no doubt that the benefit was confined to repayment of the amounts that the person who sought relief had actually paid.

A question arises upon the provisions of s. 45, sub-ss. 1 and 2. I do not propose to decide the question whether the Crown has a right to assess the new owner of a business in respect of excess profits made by his predecessor, and I do not propose to decide whether, assuming that the Crown has that right and does assess a new owner in respect of excess profits made by his predecessor, the new owner is entitled to be placed in the position of his predecessor for the purpose of the relief granted by s. 38, sub-s. 3. He may or may not. It seems that that is an exceptional case which may fall to be decided; but apart from that, I do not think there can be any question as to the meaning of s. 38, sub-s. 3. But then the argument, and the main stress of the argument, I think, was laid upon the provisions of clause 5 of Part II. of the Fourth Schedule. Now that schedule is incorporated under the provisions of s. 40, sub-s. 2, of the Act, which provides that: "The provisions contained in the Second Part of the Fourth Schedule to this Act shall have effect with respect to the computation of the profits of a pre-war trade year." The schedule is headed "Pre-War Standard," and it proceeds to deal not merely with the computation of the profits of a pre-war trade year but also with the percentage standard, and to my mind it would be right to say that in construing those words, "computation of the profits of a pre-war trade year," at any rate it was contemplated that the provisions of the schedule were to have effect with regard to ascertaining the pre-war standard of profits. I think it cannot be doubted that that is what in fact the schedule deals with. Then one comes to the provisions of clause 5. Now what is said with regard to that clause is this, that this schedule ought to be read as applying the whole of the provisions of Part III., including s. 38, sub-s. 3, as though the trade or business had not changed ownership, and that therefore having regard to sub-s. 3, the Crown could not be heard to say that the sum claimed to be paid as being the amount paid by a new owner was not paid by him because, it is said, it is agreed that for this purpose the section is to be treated as though there had been no change of ownership, and therefore the amount formerly paid, even though paid by the predecessor in business, must be treated as though it were paid by the new owner. Now I am not satisfied that that would be the plain construction even if you assumed that the words of clause 5 applied as contended for by the appellants in this case. As I have said, the words pointing to personal relief seem to me to be very plain. But I do not think that that is the right construction of the schedule.

A point was raised in the course of the discussion whether that clause applied at all in the case where the change of ownership had occurred during the war—whether it was not confined to cases where the change of ownership had occurred during the three pre-war trade years. I only wish to say that I think in the present case by consent that is not open to us and it is not a question to be decided here or on which it is necessary to express any opinion, because the case stated by the Commissioners says: "it was admitted that the case should be decided by us, the Commissioners, on the footing that (in so far as provided for in r. 5 in Part II. of the Fourth Schedule of the Finance (No. 2) Act, 1915) the provisions of Part III. of the Act and the Fourth Schedule of the Act should apply as if the trade or business had not changed ownership." Therefore we must treat the case upon that footing. Now what is the meaning of this clause in a schedule which, as I say, had been incorporated for the purpose of ascertaining what the pre-war standard of profits is to be? In the first place the section is undoubtedly badly drawn, because it says, "except in cases when the taxpayer makes an application," and then it does not proceed to say what is to happen to that application ; like a great many applications to Government departments, that is left in the air. But I think what it means, undoubtedly, is that in the case where the taxpayer makes an application that the provisions of Part III. of this Act and this schedule should apply as if the trade or business had not changed ownership, then the provisions of Part III. of this Act and this schedule shall apply as if the trade or business had not changed ownership, with the qualification which is expressed in the latter part of the section.

It is further to be noted, I think, that this is not a case and could not be a case where it would be only upon such an application that the Act and the schedule should apply to that taxpayer. Obviously the Act and the schedule apply. In other words, it is not a case where the provision is that for the first time the Act and the schedule shall apply to a new subject-matter, but it is only a provision as to the mode in which the Act and the schedule shall be construed in reference to a subject-matter to which they always applied before. When you take that into account and also take into account the fact that the schedule is incorporated in the Act for the purpose of ascertaining what the pre-war standard of profits should be it appears to me that the meaning would be properly expressed in this way by saying : "For the purpose of ascertaining the pre-war standard of profits under the Act and the schedule the business shall be deemed not to have changed ownership." That, to my mind, expresses the precise effect of clause 5 of the schedule, and I think that it is consistent with everything that is contained in the schedule itself and with the section which incorporates the schedule. In that view it appears to me that there is nothing in clause 5 which can affect the construction of s. 38, sub-s. 3, which I have already stated in my view is the correct construction. It is plain to my mind that there must be some limitation upon these general words, and indeed I think it became so plain in the course of the argument that the appellant's counsel in reply very naturally had to concede a limitation, and whereas at one time the argument addressed to us was that the provisions of Part III. of this Act and this schedule applied for all purposes in every way as though there had been no change of ownership and, therefore, incorporated the provisions of s. 38, sub-s. 3, and everything else, in reply, as I understood the argument, it was conceded that there was a limitation, and that, at any rate, it did not apply for the purpose of enabling the taxpayer to have the benefit of a percentage standard. I do not wish to decide whether that is right or wrong. All I wish to say is that the contention, as I understood it, that there was some limitation, and it was really a limitation for the purpose of ascertaining what the pre-war profits were, is an indication to my mind of the compelling force of the view that this clause has not the unrestricted application which was contended for. It does not appear to me that any light is thrown upon the matter by reference to clause 6. In the first place it is not the same clause, and in the second place I myself see nothing in clause 6 which goes beyond the ascertainment of a pre-war standard of profits. I think that effect can be given to every part of clause 6 by limiting it to that purpose.

For these reasons, without deciding what the answer is to a good many of the problems that have been suggested in this case, confining myself so far as I can to trying to determine the questions that really have to be determined in this case, it appears to me that the judgment of the learned judge was right, and the reasons that I have expressed are, I think, the reasons which actuated the learned judge. I accept his judgment and his reasoning, and in my opinion this appeal should be dismissed with costs.

YOUNGER L.J. I am of the same opinion. I agree with the view which has been expressed by the other members of the Court, that the relief granted by s. 38, sub-s. 3, of this Act, at least in a case where the person carrying on the business during the first period is somebody entirely and totally distinct from the person carrying on the business during the second, does not enure for the benefit of the successor; the relief is absolutely personal, as it appears to me, to the predecessor, and where the two persons are quite different it is not, I think, possible, on construction, to give to the second of the two any benefit in relation to the deficiency which was sustained during the period of ownership of the first. But I desire to reserve my opinion upon the question whether there might not be a benefit reserved for the second owner of the business if in truth there be one or more persons who are common owners of that business at both periods; that is to say, if there has not been a complete change of ownership but only a modification or variation in ownership. In that case it may be possible, and I reserve to myself the opportunity of considering the possibility when the case arises, that the owners of the business at the later period being composed, as they would be, of some of the persons who were owners at the earlier period, may be entitled to the benefit of the section. In that view it may be necessary at a later date to consider what the expression "owner for the time being," in s. 45, sub-s. 2, is, and it may be necessary also to consider why it is that under s. 44, sub-s. 1, the Commissioners may require an account to be rendered not only by a person then carrying on the business but by one who was engaged in carrying it on at some earlier date. It may also be worthy of discussion at some future time whether the change of ownership referred to in this statute more than once relates to anything other than what I have ventured to call a complete change of ownership.

In the present case there has been a complete change of ownership, and accordingly I agree in thinking that, on the construction of s. 38, sub-s, 3, it is not possible to say that the present owner of the business is entitled to any benefit in respect of a deficiency sustained during the time of his predecessor. So much for the question as it arises under s. 38, sub-s. 3, of the Act.

With regard to the question as it arises under clause 5 of Part II. of the Fourth Schedule, if I may be allowed to do so I should wish to adopt, and follow, the principles of construction with regard to this clause of the schedule which have been laid down by the Master of the Rolls. It is I think necessary that the words of this clause, if they can be fairly so read, should be read as going no further than the terms of the words in which the schedule is introduced, having regard to the heading of the fasciculus of clauses which represent Part II. So construing this clause, there is only one qualification, if I may be allowed to say so, which I would desire to make upon the construction of it as indicated in the judgments of my Lord and of Lord Justice Atkin. They have construed the clause as they have done upon the concession which they were willing to make, that although the words "except in cases when the taxpayer makes an application that the provisions of Part III. of this Act and this schedule should apply as if the trade or business had not changed ownership" are contained in the clause without any result of that application being expressly indicated the words must be read as if it were to be assumed that the application was granted. Speaking for myself I think I should feel with regard to this clause a greater difficulty than I do if I thought it were necessary to arrive at the conclusion that the statement here that the application may be made without any statement as to its fate presupposes that the application when made will be granted. And my difficulty is that if that consequence is to be read into this section, then I think it hard to say that if all the provisions of Part III. of the Act and all the provisions of the whole schedule are to apply you can exclude any which might be said to be relevant. But in my view, rightly or wrongly, on the true and proper construction of this particular clause it is not necessary to assume that this application when made shall be granted. I will endeavour to read this clause, without I think adding any words, in order to express what I suggest and believe to be its meaning: "Where since the commencement of the three last pre-war trade years a trade or business has changed ownership the provisions of this part of this schedule shall apply as if a new trade or business had been commenced on the change of ownership, except in cases when the taxpayer

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makes an application that the provisions of Part III. of this Act and this schedule should apply as if the trade or business had not changed ownership"; and then I would go on: "But where the taxpayer does make an application that the provisions of Part III. of this Act and this schedule should apply as if the trade or business had not changed ownership, then, where since the commencement of the three last pre-war trade years a trade or business has changed ownership the provisions of this part of this schedule shall apply as if no new trade or business had been commenced on the change of ownership"; and then going on: "But in that case such modifications (if any) shall be made in the application of this schedule as may be necessary to make the basis on which the profits standard is computed the same as that on which the profits of the accounting period are computed." That is to say, this particular application is only to have effect so far as the provisions of this part of this schedule are concerned, with the modifications indicated as necessary in the clause itself.

Now if that be the true construction of this clause, and it appears to me that one arrives at that construction merely by filling in the only implication which has I think grammatically necessarily to be read into it, then it becomes clear that its effect is not to introduce anything into the position except that which is contained in this part of the schedule. The result of that, of course, is that s. 38, sub-s. 3, is in no way introduced, and that accordingly this particular clause does not help the applicant any more than does s. 38, sub-s. 3, itself without its assistance.

For these reasons I am of opinion that the decision of Mr. Justice Rowlatt was right and that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Norman P. Hart; Solicitor of Inland Revenue.*

G. A. S.

COMMISSIONERS OF INLAND REVENUE, APPELLANTS v. SANGSTER, RESPONDENT.

1919
Dec. 15, 16.

Revenue—Excess Profits Duty—Trade or Business—Receipt of Royalties from Company in respect of Licences to make and sell Inventions of Licensor—Licensor preponderant Shareholder and Managing Director of Company—Finance (*No.* 2) *Act,* 1915 (5 *&* 6 *Geo.* 5, *c.* 89), *s.* 38, *sub-s.* 1.

The respondent had for many years been an inventor and had been granted nearly four hundred patents. Of these he had only sold one, and that was about twenty-five years ago. He was managing director of a company which worked certain of his patents and paid him a fixed salary and commission dependent on results, and he was also managing director of, and preponderant shareholder in, another company of which he was the promoter and which paid him royalties on non-exclusive licences in respect of certain of his patents granted by him to the company. He was also a director of several other manufacturing companies:—

Held, that he was not carrying on a trade or business within the meaning of s. 38, sub-s. 1, of the Finance (No. 2) Act, 1915, so as to be liable to the excess profits duty imposed by that section.

CASE stated by the Commissioners for the Special Purposes of the Income Tax Acts.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held for the purpose of hearing appeals, the respondent Sangster appealed against an assessment to excess profits duty in the sum of 8367*l.* for the accounting period of one year ended August 31, 1915, made upon him by the Commissioners of Inland Revenue under the provisions of the Finance (No. 2) Act, 1915, Part III., and subsequent enactments.

The respondent has for many years past been an inventor and has applied for and been granted a large number of patents, in all amounting to rather under 400. Of these he has only sold one. That was about twenty-five years ago. He does not himself manufacture articles so patented nor is he connected with their manufacture otherwise than as hereinafter set out.

Since August 4, 1910, the respondent has obtained patents as follows: (*a*) Thirty-seven patents other than war-appliance patents; (*b*) twelve war-appliance patents.

Of the patents in class (*a*) all except three were taken out in pursuance of the agreement with a company named Components, Ld. (hereinafter mentioned), and were all worked out by the staff of that company. The three patents above mentioned belonged to another company (the Endless Rim Co., Ld.) under similar circumstances, the respondent having received nothing therefrom, and are not further hereinafter referred to.

On February 15, 1907, the respondent entered into two agreements with Components, Ld. This company manufactures and deals in (inter alia) cycle parts and accessories.

At the date of execution of the two agreements the respondent was and had for some time past been managing director of Components, Ld., and one of the agreements provided that he should continue to hold that office for a further period of five years from the date of execution on the terms therein set out receiving a salary of 800*l.* per annum and commission dependent on results. The other agreement provided that on the terms and with the limitations therein expressed Components, Ld., should have the right to elect to be interested in and entitled to a share in any discovery invention or design made by the respondent while in the employment of the company.

This right of election was exercised in the case of the patents other than war-appliance patents except the three referred to above but not as regards the twelve war-appliance patents. With regard to the patents other than the war-appliance patents, all the patent fees were paid by Components, Ld., and that company used and worked the inventions under the second agreement free of royalty. The company did not assign or grant licences to use the patents or inventions and no accounts between the respondent and the company under the second agreement were ever taken, and the respondent has received no other benefit or payment in respect of any of the patents except the salary and commission payable under the agreements.

On July 13, 1911, a limited liability company of which the respondent was promoter was registered under the

Companies (Consolidation) Act, 1908, in the name of "Decimals, Limited," with a nominal capital of 5000*l.* divided into 5000 shares of 1*l.* each of which 2000 were issued—2000*l.* being subscribed in cash. The object of the company as stated in its articles of association was to carry on the business of mechanical engineers, etc. Primarily the company was formed to work a steel-rolling process invented by the respondent to whom 2000*l.* was paid in cash for the right to use the process.

In the year 1914 the called-up capital of Decimals, Ld., was increased by the issue of 2000 preference shares and in 1916 the capital was increased to 20,000*l.* by the creation of 15,000 additional ordinary shares, making in all 18,000 ordinary shares and 2000 preference shares. The respondent owns 12,500 out of the 18,000 ordinary shares. From the formation of the company the respondent has been a director. On July 16, 1914, he and a Mr. C. R. Garland were, by a resolution passed at an extraordinary general meeting, appointed life directors, at a salary of 250*l.* per annum each. The 2000 preference shares were subscribed for by Mr. R. Garland—1500 in his own name and 500 in the name of his son, Mr. C. R. Garland—with the intention and on the condition that the son who (as above stated) became life director should take the leading part in the management and control of the working of the company's business. Mr. C. R. Garland, however, joined the army, and since then the chief part in the management and control of the business has devolved upon the respondent.

The respondent is a director of several other manufacturing companies in addition to Components, Ld., and Decimals, Ld.

When the war-appliance inventions were disclosed to Components, Ld., pursuant to the agreement of February 15, 1907, that company passed a resolution that it would not take them over, that it had no objection to the respondent entering into arrangements with Decimals, Ld., relative to the inventions and that the respondent should be allowed a reasonable time for attending to the business of Decimals, Ld., in connection therewith. Agreements were accordingly entered into between the respondent and Decimals, Ld., under which the former as licensor granted to the latter as licensees power and authority to make, use, exercise and vend in the United Kingdom the inventions protected by the war-appliance letters patent. The agreements respecting the several war appliances were in similar form. Under each the respondent became entitled to royalties for every complete article manufactured or sold by the licensees under the licences.

After the outbreak of the war in August, 1914, Decimals, Ld., included in their operations the manufacture of munitions of war, and obtained large orders from the Ministry of Munitions. The articles for which the respondent obtained grants of letters patent are among those so manufactured and amount to about fifty per cent. of the output of the company.

In the accounting period of twelve months ended August 31, 1915, the respondent received from Decimals, Ld., in respect of royalties paid under the several agreements above mentioned the sum of 14,145*l*., and the sole point on which the opinion of the High Court was sought was as to whether those royalties were receipts arising from a trade or business within the meaning of s. 38, sub-s. 1, of the Finance (No. 2) Act, 1915.

On behalf of the respondent it was contended (*a*) that the 14,145*l*. was income from property and not profits arising from a trade or business; or alternatively, (*b*) that the respondent was within the exemption granted in certain cases to professions by s. 39, clause (*c*) of the Finance (No. 2) Act, 1915. On behalf of the Commissioners of Inland Revenue it was contended that having regard to all the facts herein set out the 14,145*l*. was rightly regarded as receipts arising from a trade or business within s. 39 and that the assessment had accordingly been rightly made.

There was a difference of opinion between the Special Commissioners, one of them regarding the contention (*a*) put forward on behalf of the respondent as correct in law, while the other thought that though in many cases profits from royalties are not profits arising from a trade or business within the meaning of s. 38, sub-s. 1, of the Finance (No. 2) Act, 1915, inasmuch as in the present instance the facts showed that the respondent had made it the business of his life to discover and invent means whereby profits could be realized in the course of trade, and to take an active part in the supervision, management and control of the manufacturing and trading operations necessary to that realization, the 14,145*l.* accrued to him from a business within the meaning of that word as used in s. 38, sub-s. 1, and that he was not within the exemption conferred by s. 39, clause (*c*) of the Finance (No. 2) Act, 1915.

In the circumstances the Special Commissioners gave their determination in favour of the respondent and discharged the assessment.

The Commissioners of Inland Revenue appealed.

T. H. Parr and *R. P. Hills* (*Sir Gordon Hewart A.-G.* with them) for the appellants. The respondent was carrying on the business of inventor and royalty owner, and of exploiting his patents and taking an active part in operations which would frequently be business operations of the company working the patents and deriving the profits out of which the royalties were paid, the company having been promoted by the respondent for the purpose of doing so. He converted the results of his brain work into commodities which he sold and exploited in the market. He went very much further than simply inventing and handing over his invention to another person.

[They also contended that the respondent did not carry on a profession within the meaning of exception (*c*) of s. 39 of the Finance (No. 2) Act, 1915, but as no decision was given upon this point it is not considered necessary to set out the arguments upon it.]

Tomlin K.C. and *A. M. Latter* for the respondent. The respondent was not carrying on any business. He was an inventor who made ingenious discoveries and put them into operation. A patent is a right of property which the Crown, in the exercise of its discretion, grants to an inventor. It does not give him a right to make, exercise and sell the articles because he could do that whether he had taken out a patent or not. It merely gives him the right to say to other persons "You shall not make, exercise or vend my invention without my permission." It is a right of property which can be utilized so as to produce fruit by the grant of a licence just as a person who has built a house can extract gain from it by letting it. When he has let it for a term of years, the rent which he receives is income from his property, and in the same way, a person who grants a licence for a term of years to work a patent at a royalty is receiving a rent for the use of his property. The rent or profit which arises from the grant of a right to use a patent is quite distinct from the profits which arise from the making and sale of the article manufactured under the patent. It is an accident that the respondent occupies the three divers positions of director, shareholder, and royalty owner. Those positions do not constitute a business. The respondent did not habitually devote himself to inventing things and selling them for a royalty. In order to constitute a business there must be the habitual repetition of the acts. The question is to some extent one of degree. There may come a point at which it can be said there is a business, although at another point it can be equally clearly said there is not. There is no such thing as the business of an inventor. He merely exercises his intelligence and advances the sum of human knowledge. He does not hold himself out as providing something the public want and selling it to them. The distinction between property and the profits of a business is clearly recognized in the Income Tax Acts. There is no assessment on the respondent in respect of his royalties from patents. His income tax is deducted at the source under s. 25, sub-s. 1, of the Finance Act, 1907 (7 Edw. 7, c. 13).

If an agreement were made in 1915 by which a licence was granted and within twenty-four hours of the making of that agreement the respondent had died, his royalties would have been vested in his executors, and they would have gone on receiving them during the term of the licence.

It could not be said that the executors were carrying on a business, and yet that must necessarily follow if the Crown is right. No profit and loss account could be made up based upon the respondent's expenses on one side, which are very trifling (possibly merely debiting the concern with his own time), and bringing in on the other side the estimated value of the patents which he had sold, as he had not dealt with them by selling. The element of "carrying on" is very important in considering whether there is a business. In order that the respondent may be liable to excess profits duty it must be found that there is a business assessable to income tax under Case 1 of Schedule D of the Income Tax Act, 1842. But if there is a form of property which is not assessable as a business to income tax under Case 1 of Schedule D but only a form of property which is liable to tax by deduction, there is nothing which is, in the contemplation of s. 38, sub-s. 1, of the Finance (No. 2) Act, 1915, liable to excess profits duty.

[Halsbury on the Laws of England, vol. xxii, p. 127, para. 267; *Edwards & Co.* v. *Picard* (1); and s. 43 of the Finance (No. 2) Act, 1915, were also referred to.]

Hills in reply. The respondent carried on the business of making, developing and dealing in patented articles, and promoting and supervising their manufacture and sale. He created and put a commodity on the market and obtained a profit from it. An inventor cannot be separated from his market. A patent has to be marketed somewhere. The inventions were essentially practical commercial inventions which had to be placed on the market. The respondent supervised the inventions and produced a market for them. The fact that he received payment for them, not in a lump sum, but merely in the form of an annuity, is immaterial.

The difference between a business and ownership of property cannot depend upon the actual method of payment. The respondent was still carrying on the business of an inventor.

(1) [1909] 2 K. B. 903.

ROWLATT J. This case raises some points which are, in my judgment, of considerable nicety and difficulty, and it is perhaps unfortunate that the findings of fact of the Commissioners are not more definite; but I can deal with the case upon the facts as they appear.

The respondent has, no doubt, great inventive ability, and it appears sufficiently from the facts that he not only has what I may call abstract inventive ability, but business ability too, and a knowledge of the trade in connection with which he has made his inventions. In those circumstances he has taken out a great many patents which, under an agreement which he has had for many years past with Components, Ld., have passed to that company. He has also taken out in the period since the war a number of other patents relating to war appliances which have not passed to that company, but are worked by Decimals, Ld., of which he is managing director and in which he is the preponderant shareholder, and that company pays him royalties for the non-exclusive licences which he has granted one by one in respect of his war patents as he took them out. In those circumstances he has been assessed to excess profits duty as carrying on a trade or business, and his assessment has been put upon the amount of the royalties. It is quite clear that when a person has invented a number of things, and entered into royalty agreements or licences in respect of them, he enjoys an income from what is in law property and in fact that income would continue in the hands of his executors if he died, it would continue payable to his committee if he became a lunatic, it would be payable to himself if he gave up all active pursuits and lived without exerting himself as a retired man. There is therefore a very great difficulty in treating this royalty income as anything other than income of an investment which has been called into being by his past efforts. Assuming that in inventing and becoming possessed of the valuable property represented by his patents he was carrying on a business, his position when he has entered into the enjoyment of his royalties is just the same as it would have been if he had been in the enjoyment of income derived from investments in the public funds, made with money which he obtained from selling his patents. Instead of changing the investment from an existing patent which he has created by selling it and buying funds, he has retained the investment which he has created, and his executors will enjoy it after his death should he die before it expires.

But upon behalf of the appellants it has been contended that it is not the true view to look upon his position merely as that of a royalty owner, inasmuch as he has not retired nor is he dead, or in a lunatic asylum, but whereas the assessment was made in respect of the accounting period ending August 31, 1915, he was busily engaged in inventing all through 1916, and he is still inventing, and has his own market under practically his own control in this company; he is supervising the exploitation of these inventions and the manufacture of the articles under the licences, and it is said that, looked at as a whole, he is carrying on a business. It is I think somewhat inexact, and only hides what is really vague, to say that what is called reality must be looked at.

The respondent is managing director of a company: that is not, nor is being a shareholder, carrying on a business. He is also an owner of royalties. That again is not carrying on business. But those are the whole sources of his income. It is true that he is adding to his royalties, and he is performing his duties of managing director of the company and it may be very advantageous that he has those positions—that he has that particular form of property and is creating more, but I do not think those matters can be added together and that it can be said, in what I cannot help describing as a loose way, "Look at the general position." I think the respondent's position must be dissected and what his income is really derived from must be ascertained. In my judgment it is derived from those three distinct sources, and he is not, in respect of each or all of them put together, deriving this royalty income from a business.

On behalf of the respondent Mr. Tomlin referred to s. 35 of the Finance (No. 2) Act, 1915, which enacts that where a person has paid excess profits duty he may deduct the amount paid as excess profits duty in the computation of his income for income tax purposes. I think s. 35 confirms the view I take. There is no assessment upon the respondent from which he can deduct excess profits duty. He is taxed upon his income no doubt rightly enough; the company is taxed before his dividends are paid; his salary as managing director is taxed, and so are his royalties, but there is no assessment from which he can possibly deduct excess profits duty. It looks as if in the use of the vague word "business"—and it is very unfortunate that in taxing Acts words are used which are essentially among the vaguest in the English language—the Legislature was not glancing at anything more than that which is taxable under Case 1 of Schedule D of the Income Tax Act, 1842. However, I do not decide that.

But that does not exhaust this case because—although I do not see how his royalty income can be treated, when it has become a royalty income, as derived from a trade or business carried on—it is said that the respondent ought to be treated as carrying on a business of inventing, the profits of which are to be arrived at in a different way. It is said that if a person habitually invents, or habitually paints pictures or habitually writes books, with a view to gain from the patents when he has taken them out, the books which he has written and the pictures which he has painted, that is carrying on a business, and I feel a little difficulty about it. Very possibly if a person habitually paints a number of pictures year after year and sells them, it would be said that he was carrying on a business. He might be a professional man, but that is another matter. If he was writing books habitually year after year and carrying on a business, I suppose he would be assessable under Schedule D in respect of it. If he was inventing patentable devices year after year and selling them and gaining an income, it would be difficult perhaps to say that he was not carrying on a business—I do not know whether that could be said—and if he kept on developing land and selling year after year he would be carrying on a business. On the other hand Mr. Tomlin asks, "Supposing he has land and keeps on building on it and never sells it at all but has rent from the houses that he builds, is he carrying on a business?" One cannot help feeling that the answer to that question must be "No," because he is merely investing his money in new property and keeping it; he is not dealing with it in any way.

Now the respondent does not sell his patents. He sold one twenty-five years ago, but it is quite clear that that is not the way in which he deals with the product of his inventive ability. He simply keeps on inventing things and keeping the patent in his own hands, making what he can out of it by granting licences, just as a man builds a house and makes something out of it by letting it. Of course a painter cannot, as things are, do otherwise than sell his pictures. An author is more like an inventor, because he can grant licences under royalties.

It seems to me that the true position is that, unless it can be shown that the property called into existence by the invention, or by the painting, is sold so as to obtain a money return against it, no evidence is produced that the inventor or artist is carrying on a business. If the artist or the inventor sells the product of his ability, in many cases inquiry would have to be made whether he does so so habitually as to bring him within the category of persons who carry on a business, but if he does not sell at all I do not think there is any evidence in support of the contention that he carries on a business.

It is said by Mr. Hills, for the Crown, that by granting these licences the respondent is putting his patent on the market. So he is, but so is the man who builds a house and lets it. It seems to me that carrying on a business involves, in a case like this, the disposal of the article which is produced as opposed to retaining it as a valuable thing in itself which can be treated as an investment, just as anything bought with the money obtained for it if it had been sold could be treated as an investment. On those grounds I think that the respondent cannot be regarded as carrying on a business.

I think it better not to say anything upon the question whether if I had held he was carrying on a business, I should have held that his business was a profession. I say nothing upon that question.

I therefore think that this appeal must be dismissed with costs.

Appeal dismissed.

Solicitor for appellants: *Solicitor of Inland Revenue.*

Solicitors for respondent: *Field, Roscoe & Co., for Pinsent & Co., Birmingham.*

J. E. A.

1919
Dec. 16.

COMMISSIONERS OF INLAND REVENUE *v.* KOREAN SYNDICATE, LIMITED.

Revenue—Excess Profits Duty—"Trade or Business"—Limited Company—Income from Interest and Royalties—No active Business Operations—Finance (No. 2) Act, 1915 (5 *&* 6 *Geo.* 5, *c.* 89), *ss.* 38, 39.

The entire income of a limited company, formed for the purpose of acquiring, working or leasing concessions in Korea and elsewhere, was derived from interest on money on deposit at a bank and royalties payable by lessees under a lease granted by the company of the company's share in a concession in Korea. The company's operations were confined to the collection of these two sources of income and to the payment of the premiums on a sinking fund policy:—

Held, that the company was not carrying on business within the meaning of s. 39 of the Finance (No. 2) Act, 1915, and that its profits were, therefore, not liable to be charged with excess profits duty.

CASE stated under the Finance (No. 2) Act, 1915, s. 45, sub-s. 5, and the Taxes Management Act, 1880, s. 59, by the Commissioners for the Special Purposes of the Income Tax Acts.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on June 11, 1918, for the purpose of hearing appeals, the Korean Syndicate, Limited (hereinafter called the Syndicate), appealed against assessments to excess profits duty on the sums of 1112*l.* 10*s.* and 1900*l.* 10*s.* for the accounting periods ended March 31, 1916, and March 31, 1917, respectively, made upon them by the Commissioners of Inland Revenue under the provisions of the Finance (No. 2) Act, 1915, Part III., and subsequent enactments.

The Syndicate was a company incorporated on January 19, 1905, under the Companies Acts. Among its objects as set forth in its memorandum of association were the following: (1.) To apply for, purchase or otherwise acquire concessions, rights and privileges of any and every kind for or in relation to mining, electrical, agricultural, land or water, or any other rights or purposes, or the construction, execution, carrying out, equipment, improvement, management, administration, or control of works of any kind in Korea or elsewhere, and to work, exploit, and turn the same to account. (8.) To receive money on deposit and to lend money to any company, partnership, association, or persons upon security of their undertaking, property, estate, assets and effects, or any part thereof, or without security, and generally upon such terms as the Board may deem expedient. (9.) To invest and deal with any moneys of the company not immediately required upon such securities and in such manner as may seem expedient. (15.) To improve, manage, work, develop and turn to account any property, real or personal, acquired by or in which the company is interested, and to sell, lease, convert into money, barter or otherwise dispose of, the undertaking, property, assets and effects of the company, or any part thereof, for such consideration as the company may think fit, and in particular, for shares, debentures or securities of any other company. Art. 125 was as follows: "No dividend, instalment of dividend or bonus shall be payable except out of profit arising out of the business of the company or in excess of any amount recommended or approved by the Board."

The authorized capital of the Syndicate on its incorporation was 10,100*l*. The capital was subsequently increased to 14,364*l*. In 1912 the capital was reduced to its present figure of 9460*l*. The company had a sinking fund policy for 14,400*l*. payable after the year 1926, at an annual premium of 747*l*. 12*s*., which the directors were by special resolution authorized to pay out of the profits arising from the business of the company.

During the years which fell under review for the purpose of the assessments appealed against, the income of the Syndicate had been derived solely from (1.) the interest on a bank deposit which represented the money received by the company for its holdings in a company called the Korean Waterworks, Ld., which had gone into liquidation in consequence of its property and undertaking having been purchased by the Japanese Government; and (2.) royalties received under a lease which had been granted by the Syndicate to another company of the Syndicate's share in a certain concession in Korea extending over 216 square miles on which was situated a gold mine.

The syndicate employed as its agent a resident in Korea at a small retaining fee of 25*l*. per annum, but unless the taking of steps to ascertain the true amounts of royalties and interest receivable, the receiving of those amounts, and the distributing of the same amongst the members of the Syndicate were held to constitute the carrying on of a trade or business within the meaning of Part III. of the Finance (No. 2) Act, 1915, the Syndicate did not carry on any trade or business in the years under review. The assessments appealed against were made on the profits of the Syndicate computed in accordance with the Acts relating to excess profits duty. It was contended on behalf of the Syndicate that in the circumstances the Syndicate was not carrying on a trade or business within the meaning of s. 39 of the Finance (No. 2) Act, 1915.

The Commissioners allowed the appeal and discharged the assessments appealed against.

T. H. Parr (*Sir Gordon Hewart A.-G.* and *R. P. Hills* with him) for the appellants. By s. 38 of the Finance (No. 2) Act, 1915, the excess profits duty is charged upon the profits arising from any trade or business as defined by s. 39. The word "business" in this connection has a very wide meaning, and is used to connote any occupation engaged in by a company or an individual for the purpose of profit. The language of r. 8 in Part I. of the Fourth Schedule shows that actual trading is not necessarily an element in the carrying on of a business. This company was formed for the purpose of carrying on business; it is still in active being; it leases a concession to another company and thereby earns profits. By s. 129, sub-s. 3, of the Companies (Consolidation) Act, 1908, a company may be wound up if its business is suspended for a year. It could not be successfully contended that this company could be wound up under that provision, for it has not suspended its business. It is carrying on business, although the nature of the business is such that at the present time no active business operations are being carried on. *Inland Revenue Commissioners* v. *Marine Steam Turbine Co.* (1) is distinguishable, for there the company had sold the whole of its property. It may be that an individual who was in the same position as this company would not be carrying on a business, but, as was pointed out by Hamilton J. in *Liverpool and London and Globe Insurance Co.* v. *Bennett* (2), in the matter of investments "the case of an individual trader does not seem analogous to that of a company whose powers of investment are limited by the memorandum and articles of association"; and a trading company "has no field of operations outside its business." In the same case in the Court of Appeal Moulton L.J. used language to the same effect. (3)

Clauson K.C. and *A. M. Latter* for the respondents. The observations of Hamilton J. and Moulton L.J. have no application to the question whether a business is being carried on within the meaning of s. 39 of the Finance (No. 2) Act, 1915. For the purposes of excess profits duty no distinction can be drawn between a company and an individual: *Inland Revenue Commissioners* v. *Marine Steam Turbine Co.* (1) The mere incorporation of a company does not involve the carrying on of business. A company must have an object; it need not have a business. Sect. 19 of the Act of 1908 gives instances of companies which do not carry on business.

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(1) (1920) 1 K. B. 193.

(2) [1911] 2 K. B. 577, 585, 589.

(3) [1912] 2 K. B. 41, 55.

[ROWLATT J. Could one of these companies be wound up on the ground that it was not carrying on business?]

Yes, if it were not carrying out the object for which it was formed. In the Companies Acts the phrase, "carrying on business" means activity; in Part III. of the Act of 1915 it means commerce in the strict sense of the word. The mere receipt of an income from bank interest or rent, whether by an individual or a company, is not carrying on a business. [They referred to *Mitchell* v. *Egyptian Hotels* (2); *Inland Revenue Commissioners* v. *Ransom & Son* (3); and *Muat* v. *Stewart*. (4)]

T. H. Parr replied.

ROWLATT J. The question in this case is whether the respondent company is carrying on a trade or business within the meaning of s. 39 of the Finance (No. 2) Act, 1915. The company was formed with very wide powers for the purpose of engaging in ventures in the far East, but at all material times all that it was doing was that it had money on deposit at a bank on which it received interest, the money representing an asset in which the company had invested; and it was also in the position of lessor to another company of a concession in Korea, in respect of which concession the only thing the respondent company did was to receive royalties from the lessee company. The only other relevant fact is that the company had taken out a sinking fund policy for the whole amount of its capital under which the company's capital would be replaced at the expiration of the period for which the concession had been granted.

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(1) [1920] 1 K. B. 193.

(2) [1915] A. C. 1022.

(3) [1918] 2 K. B. 709.

(4) (1890) 2 Tax Cas. 601.

In these circumstances it is contended for the Crown that the company was carrying on a business within the meaning of s. 39. Now it is quite clear that a company registered under the Companies Acts must have an object, and no doubt the carrying out of that object may in one sense be said to be the business of the company, but that does not carry one very far towards the interpretation of the word "business" in Part III. of the Act of 1915. "Business" is a word of very wide meaning. It may mean any trade or only an occupation. The question which I have to determine is whether a company is necessarily carrying on business within the meaning of s. 39 merely because its activities are directed to the acquisition of gain. It is clear that this company's life is not necessarily co-extensive with the particular venture in which it is engaged. Again, a company may have two separate businesses, as was the case in *Mitchell* v. *Egyptian Hotels.* (1) In my opinion the contention of the Crown, that the company in this case was carrying on a business, fails. If what the company is doing—namely, receiving interest and royalties—was done by an individual no one would say that that individual was carrying on a business, and it does not become a business merely because it is done by an artificial body like a company and not by an individual.

But I wish to make this reservation. It does not follow that, whenever at some particular moment a company is doing nothing but receiving an income from its investments, it is not carrying on a business. The business of a company may be the investing of money, and there may be times when the company's money is all satisfactorily invested and the company does nothing but receive the dividends. It may be that in a case of that sort although the company was not actively doing anything, the right conclusion of fact would be that the company was nevertheless carrying on a business. But that question does not arise in this case. Here the Commissioners have considered what are the de facto present activities of the company, and have held that the company is not carrying on a business. I think they came to a right conclusion, and this appeal must therefore be dismissed.

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(1) [1915] A. C. 1022.

Appeal dismissed.

Solicitor for appellants : *Solicitor of Inland Revenue.*
Solicitors for respondents : *Linklater & Co.*

F. O. R.

1919 *Dec.* 16.

WHITEFIELD BILLIARD HALL COMPANY, LIMITED, APPELLANTS *v.* PICKERING, RESPONDENT.

Licensing Law—Billiards—Licence—Failure to pay Fee—Gaming Act, 1845 (8 *&* 9 *Vict. c.* 109), *ss.* 10, 11.

On March 13, 1919, the appellants applied for and obtained from the licensing justices a renewal of their billiard licence. The licence was prepared and signed by the justices' clerk, and was duly sealed, but the appellants, although notified that it was ready, did not apply for it or pay the fee to which the clerk was entitled, and in consequence of this the clerk, on April 6, treated the licence as lapsed, and so entered it in his minute book. The appellants being charged, under s. 11 of the Gaming Act, 1845, with unlawfully keeping on their premises a public billiard table without being duly licensed and not holding a victualler's licence, the justices convicted them, being of opinion that the licence had lapsed and that the appellants were in the position of having no licence:—

Held, quashing the conviction, that payment of the clerk's fee was not a condition precedent to the grant of the licence, and that the appellants were duly licensed although they had not taken up and paid for the licence.

CASE stated by Bury justices.

The appellants were charged on two informations under s. 11 of the Gaming Act, 1845 (1), with having, on July 2 and 4,

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(1) Sect. 10 of the Gaming Act, 1845, authorizes justices at their general annual licensing meeting or at any adjournment thereof, to grant billiard licences to such persons as in their discretion they deem fit and proper to keep public billiard tables, the licence to be in the form given in the third schedule to the Act, and to be in force for one year, "and the clerk of the justices shall be entitled to demand and receive from every person licensed under this Act, for the petty constable or other peace officer, for serving notices and other services required of him, the sum of one shilling, and for the clerk of the

1919, at Whitefield, in the county of Lancaster, unlawfully kept, in premises belonging to them a public billiard table for public use without being duly licensed and not then holding a victualler's licence for the said premises.

The following facts were proved or admitted :—

1. On July 2 and 4, 1919, the appellants in fact kept and used on their premises a public billiard table for public use, and did not hold a victualler's licence in respect of those premises.

2. At the adjourned general annual meeting of the licensing justices for the district on March 13, 1919, the justices renewed the licence granted to the appellants authorizing them to keep and use on their said premises a public billiard table for public billiard playing, subject to the conditions indorsed on the licence.

3. It was not proved or alleged that the appellants had broken any of the conditions upon and subject to which the licence was renewed.

4. The licence so granted and renewed was prepared and signed by the clerk to the licensing justices and was duly sealed by them, and the usual notice was sent to the appellants by the clerk to the justices that it would be given out to them on application, but no application was made for it, and the licence was never taken up or paid for by the appellants but remained in the office of the said clerk.

5. On April 6, 1919, in consequence of the licence not having been taken up and paid for by the appellants, the said clerk treated it as lapsed and so marked it in his minute book.

6. No evidence was adduced by the appellants to account for the non-taking up and paying by them for the licence ;

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justices, for the licence, the sum of five shillings. . . . ."

Sect. 11 : "Every house, room, or place kept for public billiard playing, or where a public billiard table . . . . is kept, at which persons are admitted to play, except in houses or premises specified in any licence granted under the Alehouse Act, 1828, hereinafter called a victualler's licence, shall be licensed under this Act ; and every person keeping any such public billiard table . . . . for public use, without being duly licensed so to do, and not holding a victualler's licence for the house or premises where such billiard table . . . . is kept or used" shall be liable to a penalty.

the only explanation offered being that it was due to an oversight.

7. On the occasion of the grant of the licence in the previous year the appellants had been twice reminded by the clerk before they took up the licence, and the justices were of opinion that the appellants had no intention of taking it up and paying for it.

For the appellants it was contended that the licence, having admittedly been renewed, could not be treated by the clerk as having lapsed, merely because it was not taken up and paid for by the appellants; and that in the circumstances of the case the appellants did not, in fact or in law, keep or use a billiard table without a licence and, therefore, could not be convicted of the offence charged.

The justices being of opinion that the licence had lapsed and was not in force on the material dates held that the appellants were in the position of having no licence. The justices accordingly convicted the appellants and imposed a fine.

Hon. Stephen O. Henn Collins for the appellants. The justices were wrong in convicting the appellants. The payment of the fee to the justices' clerk provided for by s. 10 of the Gaming Act, 1845, is not a condition precedent to the grant of the licence. As Martin B. said in *Thompson* v. *Harvey* (1), "it is a rule of construction that matters shall not be deemed to be conditions precedent unless they are declared to be so." The fee is payable to the clerk personally, and the circumstance that it is not paid does not affect the validity of the licence that was in fact granted to the appellants at the licensing meeting. The clerk may possibly have a civil remedy for his fee but he cannot seek to enforce it in this indirect way.

Jeeves for the respondent. The appellants were not duly licensed and were therefore properly convicted. A person to be duly licensed must have the licence in his possession and be in a position to show it on demand. By not taking up the licence on receiving notice that it was

(1) (1859) 4 H. & N. 254, 262.

ready the appellants must be taken to have abandoned their right to have it.

A. T. LAWRENCE J. In this case Mr. Jeeves, for the respondent, has contended that the appellants were not duly licensed because they had not taken up the licence and paid the clerk's fee of five shillings. In my opinion this contention is not sound. It involves this, that the appellants were bound to pay the fee before they were licensed whereas s. 10 says that the clerk shall be entitled to demand and receive "from every person licensed under this Act" the prescribed fee. Instead of payment of the fee being a condition precedent to the grant of the licence, the licence is a condition precedent to the right to demand the fee. The clerk in this case, without any right to do so, treated the licence as lapsed because he had not been paid his fee. Remedies are no doubt open to him to enforce payment of the fee, but no provision in the Act entitled him to cancel the licence ex mero motu. His purporting to do so had no legal effect, and the justices were consequently wrong in holding that the licence had lapsed, and convicting the appellants. The appeal must be allowed and the conviction quashed.

AVORY J. I agree. It may be asked, What is the practical remedy in the case of a person who applies for a billiard licence and does not pay the clerk's fee? There are two answers to that question. The first is that the clerk can sue for his fee, and the second is that if he does not succeed in recovering it the justices, when an application for a renewal of the licence is made to them, will no doubt know how to deal with it.

SANKEY J. I agree.

Appeal allowed; conviction quashed.

Solicitors for appellants: *Thompsons, Quarrell & Jones, for C. H. Pickstone, Radcliffe.*

Solicitors for respondent: *Snow, Fox & Higginson, for Sir Harcourt Clare, Preston.*

J. S. H.

1919
Dec. 16.

GLADSTONE, Appellant *v.* BURTON, Respondent.

Insurance (National)—Employer—Failure to affix Stamps on paying Wages—Affixing Stamps on Expiration of Currency of Card—National Health Insurance (Collection of Contributions) Consolidated Regulations, 1918, *reg.* 10.

Regulation 10, para. 1, of the National Health Insurance (Collection of Contributions) Consolidated Regulations, 1918, provides for the payment of contributions by means of stamps affixed to the employed contributor's card.

Para. 2: "An employer who is liable to pay contributions in respect of any contributor employed by him shall pay those contributions at the following times and in accordance with the following provisions, that is to say:—

"(i.) Where he pays to the contributor wages or other pecuniary remuneration in respect of the employment, he shall, before paying to the contributor the wages or remuneration in respect of the period for which contributions are payable, affix to the card of the contributor a stamp or stamps in payment of the contributions due in respect of that period: Provided, nevertheless, that it shall be the duty of the employer in any case—(*a*) before the termination of the employment, except where the employment is terminated by the contributor without any notice or intimation to the employer, in which case the employer shall pay contributions within fourteen days of the termination of the employment, (*b*) within six days after the expiration of the period of currency of the card, (*c*) within 48 hours after receiving a request in that behalf from the contributor,—to affix to the card of the contributor a stamp or stamps in payment of all the weekly contributions payable in respect of the period ending at the date of such termination, expiration, or request. . . . ."

Before paying his servant's wages for the week commencing May 12, 1919, the respondent did not affix an insurance stamp on the servant's card. In proceedings against him for not having done so, he stated, as was the fact, that he always stamped the whole of the card on the expiration of the period of its currency, claiming to be entitled to do this by virtue of clause (*b*) of the proviso to para. 2, sub-para. (i.), of reg. 10:—

Held, that sub-para. (i.) imposes an absolute obligation upon an employer to affix a stamp or stamps before paying wages, and that clause (*b*) of the proviso does not provide an alternative method for the employer to pay the insurance contributions, but deals with the case where, although the requirements of sub-para. (i.) have been complied with, the servant's card is not fully stamped at the expiration of its currency.

Case stated by Derby justices.

An information was preferred by the appellant against the respondent for having on May 17, 1919, failed to pay a contribution in respect of the week commencing May 12, 1919, which he was liable to pay under Part I. of the National Insurance Act, 1911, in respect of an employed contributor named Pilkington.

At the hearing it was proved that Pilkington had been employed by the respondent as a stud groom between November 18, 1918, and July 18, 1919, at a wage of 2*l.* 10*s.* per week, payable weekly or fortnightly, and stud groom's fees; that in January, 1919, Pilkington handed to the respondent a blank contribution card issued under the National Insurance Act, 1911, and current for the period from December 30, 1918, to June 29, 1919; that on May 17, 1919, the respondent paid Pilkington his wages for the week commencing May 12, 1919, but did not, on or before payment of the wages, pay the insurance contribution of sevenpence for the week commencing May 12, 1919, by affixing a stamp to his contribution card; that on May 31, 1919, the respondent handed to Thomas Bright, an inspector under the National Insurance Act, 1911, Pilkington's contribution card wholly unstamped, and informed Bright that he always stamped the whole of the card at the end of the period of the currency of the card; that Bright then gave the respondent a marked duplicate of the card, and at the end of the currency thereof the respondent duly stamped it and delivered it to Pilkington, who lodged it with his approved society and received a record card showing that the whole of the contributions for the currency of the card had been duly paid.

For the appellant it was contended that reg. 10, para. 2, sub-para. (i.), of the National Health Insurance (Collection of Contributions) Consolidated Regulations, 1918 (1), imposes an obligation on an employer to pay contributions in all cases before payment of the wages for the period in respect of which the contributions are payable, subject to the further obligations imposed by the proviso to the regulation in the cases to which that proviso refers.

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(1) This regulation is set out in the headnote.

For the respondent it was contended that by clause (*b*) of the proviso the respondent complied with his obligations under the regulation by affixing within six days after the expiration of the period of currency of the card stamps in payment of all the weekly contributions payable in respect of the period ending at the date of that expiration.

The justices upheld the respondent's contention, and dismissed the information.

Harold Murphy for the appellant. The justices were wrong in holding that the proviso to para. 2, sub-para. (i.), of reg. 10 provides an alternative method of complying with an employer's obligation as to stamping cards. Para. 2, sub-para. (i.), creates an absolute obligation to affix a stamp or stamps to the insurance card before paying wages to the employed contributor; the proviso imposes additional obligations on the employer in the cases there mentioned. Clause (*b*) of the proviso, which the justices have held entitled the respondent to stamp the card within six days of the expiration of the currency of the card irrespective of the dates at which wages were paid, was intended to cover cases where, although sub-para. (i.) had been complied with, the card was not fully stamped at the expiration of its currency. In that case the employer must affix stamps to complete the card.

The respondent was not represented.

AVORY J. In this case the justices dismissed the information on the ground that under the Consolidated Regulations made under the Act the respondent was entitled to pay the contribution within the time specified in clause (*b*) of the proviso to sub-para. (i.), and irrespective of the dates at which he paid wages; in other words, the justices have held that the proviso gives the employer an alternative right as to the times at which he shall stamp his employee's insurance card. No doubt the use of the word "provided" as it appears in that regulation may easily have misled the justices; to understand its meaning the whole of this regulation must be carefully examined. In my opinion the language of sub-para. (i.) imposes an absolute duty upon the employer, in every case where he pays wages or other pecuniary remuneration in respect of the employment, to affix, before paying wages, a stamp or stamps to the employed contributor's card. Then the paragraph proceeds: "Provided, nevertheless, that it shall be the duty of the employer in any case—(*a*) before the termination of the employment . . . ., (*b*) within six days after the expiration of the period of currency of the card, (*c*) within 48 hours after receiving a request in that behalf from the contributor,—to affix to the card of the contributor a stamp or stamps in payment of all the weekly contributions payable in respect of the period ending at the date of such termination, expiration, or request. . . ." The justices have held that as the respondent, within six days after the expiration of the currency of the card, paid the whole of the contributions, and affixed the stamps for the period during which the contributor had been in his employment, he was absolved from the duty imposed by sub-para. (i.)—namely, the duty of affixing to the card a stamp before paying wages to the contributor. In my opinion, instead of the regulation providing the employer with the alternative right either to affix a stamp when he pays wages, or to affix the stamps within six days after the expiration of the period of the currency of the card, it imposes two separate and distinct duties upon the employer: first, to comply with sub-para. (i.) by affixing a stamp or stamps to the card before he pays wages, and secondly, the further duty of complying with clauses (*a*), (*b*) and (*c*) in the proviso, that is to say, he must, before the termination of the employment affix a stamp or stamps, he must within six days of the expiration of the period of the currency of the card affix a stamp or stamps and he must within 48 hours after receiving a request in that behalf from the contributor affix a stamp or stamps if that has not already been done. That in my opinion is the meaning of the proviso which must be read as if it said: "Notwithstanding that the employer has already complied with sub-para. (i.) it shall be his duty also to comply with clauses (*a*), (*b*) and (*c*) of this proviso." It is quite easy to give illustrations of the different cases in which the proviso may apply. Although the employer may have complied with sub-para. (i.) it may be that the proper number of stamps has not been affixed before the termination of the employment. Suppose, for example, that the employment terminates in the middle of a week, then, although a stamp has been affixed in the previous week when the wages were paid, the employer must, to comply with clause (*a*), affix a further stamp for the week in which the employment terminates. So with regard to clause (*b*). It may be that the period of the currency of the card expires during the employment, and although a stamp may have been affixed at the last date when wages were paid and no further wages are due till a subsequent date, it is the duty of the employer under clause (*b*) to affix a stamp or stamps within six days after the expiration of the currency of the card. Again, under clause (*c*), if the employee requests the employer to fill up the card the employer must do so within forty-eight hours, although he may have complied with sub-para. (i.) by affixing a stamp when he last paid wages to the employee.

This view is forcibly corroborated by looking at the form of the card itself. That form is prescribed by Sched. IV. to the Regulations, and reg. 40 gives it and the directions appearing thereon statutory force. Para. 3 of the directions upon the card contains these words in italics: "The card must be stamped with National Health Insurance stamps not later than the time at which wages are paid," and para. 4 embodies the provisions of the proviso in reg. 10, as it says that "the employer must also stamp the card to date and return it to the insured person at the following times: (*a*) on the termination of the employment . . . . ; (*b*) on the expiration of the period of currency of the card, or not later than six days thereafter; (*c*) within forty-eight hours after receiving a request to that effect from the insured person." These are the very matters dealt with in the proviso to reg. 10, and this confirms the view I have expressed that there is the double duty imposed by the regulation to affix a stamp or stamps before wages are paid, and also to affix a stamp or stamps to comply with the requirements of clauses (*a*), (*b*) and (*c*). For these reasons I think the justices came to a wrong conclusion and the case must be remitted to them to convict the respondent.

SANKEY J. I agree. The objects of reg. 10, amongst others, are (1.) to ensure that stamps shall be affixed before wages are paid, and (2.) to ensure that all stamps shall have been affixed and the card completed within six days of the expiration of the period of the currency of the card. In other words, the duty to affix stamps arises when wages are paid, and when the card is completed. It is quite easy to put cases where sub-para. (i.) would not compel the observance of both these duties. The form of the card sets out twenty-six weekly spaces. Assume that the employer has paid wages for twenty-four weeks and affixed stamps in the corresponding twenty-four spaces, and that he then makes a new agreement with the employee under which wages are to be paid monthly. Under sub-para. (i.) the employer would not have to affix stamps for spaces 25 and 26 because on the hypothesis wages were not to be paid on the dates covered by those spaces. The result would be, unless there is some other provision, that the card could not be completed till a fortnight later. It appears to me therefore that reg. 10, sub-para. (i.), clause (*b*), was passed to meet that particular case, that is to say, the case where, although the employer has done his duty under sub-para. (i.) it so happens that he would not be under a duty under that paragraph to complete the card. The difficulty in the case is that the second duty is introduced by the word "provided," a word which generally makes an exception to a duty already laid down. But it is to be observed that both duties are introduced by the word "shall." Sub-para. (i.) says that where the employer pays wages he "shall" affix a stamp; the other duty in the same way says that "it shall be the duty of the employer in any case," etc. It appears to me that the two duties are entirely different duties, one not excluding the other. Although the word "provided" creates a difficulty, I think the duties are double and different, and in the result I think the justices were wrong when they held that the second of those duties was simply an alternative to the first.

A. T. LAWRENCE J. I entertain some doubt upon this question, but not sufficiently strong to justify me in expressing a different opinion.

Appeal allowed.

Solicitor for appellant: *Solicitor to Ministry of Health.*

J. S. H.

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Dec. 3, 4, 17.

RALLI BROTHERS *v.* COMPAÑIA NAVIERA SOTA Y AZNAR.

Shipping—Charterparty—Freight—Exceptions—Restraint of Princes—Foreign Law—Conflict of Laws—Mutual Inability of Charterers and Shipowners—Liability of Charterers.

An English firm in July, 1918, chartered a Spanish steamship from the owners, who were a Spanish firm, to carry a cargo of jute from Calcutta to Barcelona at a freight of 50*l.* per ton, one-half to be paid to the owners in London on the vessel sailing from Calcutta and the balance to be paid at Barcelona by the receivers of the cargo, as to one-half on arrival of the steamship and the remainder concurrently with the discharge. The freight payable at Barcelona was to be paid in cash or approved bills at charterers' option at the current rate of exchange for bankers' short bills on London. The charterparty, which was made in London and was in English and on the charterers' own form, contained a cesser clause but the charterers' liability to pay freight was preserved. There was an exceptions clause which excepted "the act of God, perils of the sea, fire, barratry of the master and crew, enemies, pirates and robbers, arrests and restraints of princes, rulers and people, or accidents of navigation." The clause also enumerated a number of other exceptions which related solely to the shipowners' obligations. There was no separate exceptions clause dealing with the obligations of the charterers. The charterparty also contained an arbitration clause under which disputes were to be decided by commercial men in London. The steamship sailed from Calcutta and half the freight was duly paid.

She arrived at Barcelona on December 28, 1918, and a sum of money was paid in sterling by the receivers of the cargo. By a decree of the Spanish Commission of Supplies, dated July 2, 1918, confirmed by a Royal Proclamation of September 14, 1918, the freight on jute to Spain was not to exceed 875 pesetas per ton. Owing to alterations in the rate of exchange the freight reserved by the charterparty was, at the date of the arrival of the steamship at Barcelona, largely in excess of 875 pesetas per ton. The receivers of the cargo at Barcelona refused to pay the balance of the freight reserved by the charterparty. The Spanish owners thereupon claimed to recover the balance of the freight from the charterers in England, notwithstanding that it exceeded the freight limited by Spanish law:—

Held, (1.) That the charterparty was an English contract to be construed according to English law, but that as regards that part of the contract which had to be performed in Spain the Courts would have regard to Spanish law, although the Courts in considering whether or not there had been a breach of the contract would regard the matter from the standpoint of English law and would not admit an excuse which might be valid by Spanish law unless it was also valid by English law; (2.) that inasmuch as the Spanish law imposed an equal disability upon both contracting parties, the owners not being entitled to receive, nor the charterers to pay, freight in excess of 875 pesetas per ton, neither party could sue the other for breach of the charterparty in that respect, notwithstanding that the contract was English; (3.) that the exception of "restraints of princes" was a mutual exception and enured for the benefit of the charterers as well as of the shipowners; that the Spanish Proclamation constituted a restraint of princes, and that therefore the charterers could rely upon the exception as an answer to the shipowners' claim for freight beyond the limit fixed by the Spanish Proclamation; (4.) that in estimating the amount due to be paid, the sums paid in sterling must be converted into pesetas at the rate of exchange current on the day of payment or the day on which payment ought to have been made.

Ford v. *Cotesworth* (1870) L. R. 5 Q. B. 544, and *Cunningham* v. *Dunn* (1878) 3 C. P. D. 443 followed.

Jacobs v. *Crédit Lyonnais* (1884) 12 Q. B. D. 589 considered.

Award stated by an umpire in the form of a special case.

Differences having arisen between the owners and the charterers of the steamship *Eretza Mendi*, first, as to the liability of the charterers for payment of freight, and secondly, as to the amount of freight payable by them, if they were liable for freight, under a charterparty of the steamer dated July 3, 1918, the same were referred to arbitration in accordance with clause 29 of the charterparty.

The facts as found by the umpire were as follows:—

Ralli Brothers (hereinafter called the charterers) were

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RALLI BROTHERS v. COMPAÑIA NAVIERA SOTA Y AZNAR.

a firm of merchants having their head office in London, England.

Compañia Naviera Sota y Aznar (hereinafter called the owners) were a Spanish company having their head office at Bilbao, Spain. The company were the owners of the steamship *Eretza Mendi* which sailed under the Spanish flag. The owners acted in the charterparty under which the arbitration arose by their agents, Sota and Aznar, a firm of shipbrokers in London.

Godo & Co. (hereinafter called the receivers) were a Spanish company having their place of business in Barcelona.

On July 2, 1918, Ralli Brothers sold to Godo & Co. a cargo of jute for shipment per *Eretza Mendi* Calcutta to Barcelona, half freight payable by Ralli Brothers on steamer sailing from Calcutta and the other half payable by Godo & Co. at Barcelona. The price agreed for the cargo included the freight thereon.

On December 3, 1918, Ralli Brothers invoiced to Godo & Co. 29,338 bales of jute at sundry prices per ton—contract dated July 2, 1918—steamship *Eretza Mendi* for Barcelona.

	l.	*s.*	*d.*	*l.*	*s.*	*d.*
The amount of the invoice was				576,969	2	2
Freight @ 50*l.* per 5 bales ..	293,380	0	0			
Less advance	146,690	0	0	146,690	0	0
				430,279	2	2
Less port dues on 293,380*l.* @ 6 per cent.				17,602	16	0
Payment net cash				412,676	6	2

The umpire found that the receivers thereby were given credit for part of the freight, and the amount thereof they were to pay to the owners was part of the purchase price of the goods sold, and they were to make the advance as agents for the charterers.

On July 3, 1918, Ralli Brothers chartered on their own form of charter the steamship *Eretza Mendi* from the Compañia Naviera Sota y Aznar to load a full cargo of jute from Calcutta to Barcelona, Valencia, Alicante, Cadiz, Pasages or Bilbao as ordered on signing final bills of lading.

The charterparty form used was peculiar to Ralli Brothers and was printed in London. It was drawn up in London for the voyage to be made by the *Eretza Mendi*, and was signed by Ralli Brothers as charterers and by Sota and Aznar of London under telegraphic authority from and as agents for owners.

By clause 1 of the charter the freight was agreed at 50*l.* per ton of five bales.

The material clauses of the charterparty were as follows :—

"2. The act of God, perils of the sea, fire, barratry of the master and crew, enemies, pirates, and robbers, arrests and restraints of princes, rulers and people, or accidents of navigation excepted. Strandings and collisions and all losses and damages caused thereby are also excepted, even when occasioned by negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowners, but nothing herein contained shall exempt the shipowner from liability to pay for damage to cargo occasioned by bad stowage, by improper or insufficient dunnage or ventilation, or by improper opening of valves, sluices, ports, or other openings in the fabric of the ship, or by causes other than those above excepted, and all the above exceptions are conditional on the vessel being seaworthy when she sails on the voyage. . . .

"5. Charterers to have the option of underletting the vessel in whole or part they remaining responsible for due fulfilment of this charter.

"22. Charterers' liability to cease on completion of shipment, they remaining responsible for *freight*, *dead freight and* demurrage in loading, if any.

"25. The freight, except as provided for under clause 30, to be paid at port of discharge on the unloading and right delivery of the cargo by cash or approved bills (at charterers' option) at the current rate of exchange for bankers' short bills on London.

"26. The captain to have a lien on the cargo for all freight, dead freight and demurrage, and for any other lawful claim against the freighter.

"29. Any dispute that may arise under this charter to be settled by arbitration, each party appointing an arbitrator, and should they be unable to agree, the decision of an umpire selected by them to be final. The arbitrators and umpire are all to be commercial men, and resident in London, and the arbitration to take place there. This submission may be made a rule of the High Court of Justice in England by either party.

"30. On receipt of telegraphic advice of steamer's sailing from Calcutta charterers undertake to pay in London to owners or their agents in cash without discount, one-half of the total freight earned less any disbursements under clause 18. Such payment to be a first charge against the total freight earned and the master to so endorse on the bill of lading the amount advanced, which is to be deducted from freight due on the vessel's arrival at discharging port. The balance of the freight to be paid at the port of discharge by the receivers of the cargo, one-half on arrival of the vessel and the remainder concurrent with discharge."

On September 23, 1918, the *Eretza Mendi* arrived in Calcutta to load under the above-mentioned charter.

On or about October 12, 1918, the *Eretza Mendi*, having completed loading under the charter, sailed for Barcelona.

On October 22, 1918, the half freight—namely, 146,690*l.* due on telegraphic advice of steamer sailing from Calcutta—was paid.

On December 28, 1918, the *Eretza Mendi* arrived at Barcelona to discharge, the steamer's agents being F. Witty & Co., Barcelona.

On January 2, 1919, Godo & Co. notified F. Witty & Co. that if the freight as per bills of lading exceeded the official tariff rate they reserved the right to claim the payment of the difference which the final account on the said head might show in their favour.

On January 3, 1919, Godo & Co. paid 50,000*l.* on account of freight to F. Witty & Co.

On January 4, 1919, Godo & Co. wrote to F. Witty & Co. that they were convinced by competent persons that freight must be paid at the official rate of 875 pesetas per ton of 1000 kilos, and submitted their statement of the freight due to the *Eretza Mendi* as follows :—

	Pesetas.
29,338 bales of 400 English lbs. @ 182 kilos per bale, 5,339,516 kilos @ 875 pesetas per 1000 kilos	4,672,076.50
Paid on account 146,690*l*. on departure of vessel 50,000*l*. on arrival	
196,690*l*. at the exchange of 23.75	4,671,387.50
Remaining to be paid .. Pesetas	689.00

The umpire found that the balance so alleged was not the correct one, and that it was in fact 129,375.50 pesetas. He took for the purpose of his calculations the rates of exchange on the days when the two sums were paid.

On January 8, 1919, the captain wrote to Godo & Co. demanding from them the payment of freight at 50*l*. sterling per ton, and receiving no reply, he made a demand upon Godo & Co. on the same day through a notary informing them that he would apply for the deposit of the cargo as security for the freight owing.

On January 10, 1919, Godo & Co. wrote to the captain acknowledging his notarial demand and continued as follows : "There having been made on the 14th September last a Royal order of the Ministry of Supplies, by which by virtue of the powers given to the Government in the law called the Ley de Subsistencias of November 11, 1916, there was fixed as the maximum freight for the transport of jute for India to Spain 875 pesetas per ton, it is evident that all Spanish shipowners must respect and comply with that sovereign provision, which, having been inspired by consideration of the general interest and public policy, must prevail over any private agreements or contracts. By virtue thereof as we stated in our letter of the 4th inst. the settlement of the freight must take place in following manner." Godo & Co. then reproduced in this letter their freight statement of

January 4, 1919, and repeated that there was only 689 pesetas due to complete the freight which sum they called upon the captain to receive. They refused to pay freight as demanded by the captain and failing collection by the captain of the 689 pesetas as the balance of freight they notified him of the deposit of the said sum and called upon him to abstain from delaying the delivery of the cargo and from demanding its deposit.

On January 13, 1919, Godo & Co. wrote to the captain that he had unjustifiably detained the discharge of the *Eretza Mendi* since January 9, and maintained that freight in full had been paid in accordance with the Royal order of the Ministry of Supplies of September 14, 1918, and demanded that the discharge be no longer delayed.

On January 13, 1919, the captain acknowledged the letter of Godo & Co. of January 10, repudiated liability and informed Godo & Co. that owing to the non-fulfilment by them as holders of the bills of lading of the terms of the charter, and particularly of clauses 25 and 30 thereof, he was obliged to suspend the discharge, and that he held Godo & Co. responsible for all damages and losses caused by the stoppages of the discharge, especially for any demurrage incurred.

Proceedings took place in various Spanish Courts between Godo & Co. and the captain: they were set out in the case.

On January 21, 1919, proceedings were commenced in a Spanish Court by the captain of the *Eretza Mendi* in which the captain asked the Court to order the deposit of the cargo, and that Godo & Co. be notified of the deposit and required to pay as the amount of the freight due the sum of 96,690*l.* or its equivalent in pesetas, failing which that the sale of the necessary portion of the cargo be ordered so as to produce the amount of freight due. The Court gave the order prayed for, but Godo & Co., on January 27, 1919, deposited the sum of 2,286,718.50 pesetas as the equivalent of the sterling sum demanded at the exchange of the day and petitioned the Court to order this sum to be placed in the general deposit fund, and to order the cargo to be delivered to Godo & Co. The Court ordered the money to be placed in the deposit fund and ordered the release of the cargo, and that the captain be required to continue the delivery of the cargo to the receivers. The captain did not continue the delivery of the cargo, and the proceedings continued, and the appeal of the captain against the above decision was still pending before the Court on February 15, 1919.

The "Ley de Subsistencias" of November 11, 1916, passed by the Spanish Cortes and sanctioned by the King provided by art. 4: "The Government is also authorised for to regulate in a general character in all the realm or in one or more provinces . . . . the price of foodstuffs and raw materials. Faculty is also given to Government to adopt all dispositions it may esteem necessary with relation to Spanish ships. . . . ."

A Royal decree of May 31, 1918, provided by art. 1: "For the regulation of the maritime traffic in the transport of certain materials when importation, circulation, or exportation may be judged by the Government indispensable for the national economy in the circumstances now prevailing the whole of the Spanish merchant marine is appropriated. The Comisaria General de Abastacimientos, previously informed by the Comite de Trafico Maritimo may annul or suspend freight contracts in so far as they consider them indispensable for the disposability of the fleet and the organisation of traffic. Art. 2: The fulfilment of the service in accordance with the instructions of the Comisaria General de Abastacimientos is entrusted to the Comite de Trafico Maritimo created by Royal decree of 16th October, 1917, extending the representation of shipowners with a representative from every one of . . . . three . . . . associations. . . . . For the completion of the functions entrusted to it the Committee will have the following attributions. . . . . : (*b*) To fix with the approval of the Comisaria the corresponding freight for services to be rendered in those of national character to which the Comisaria may esteem opportune, fix a reduced freight, and in the others which will be regulated by current market rates to be determined in case of doubt by the Committee hearing the parties interested."

A decree dated July 2, 1918, of the General Commission of Supplies filed in the office of the Committee of Maritime Traffic, after stating that "by virtue of the powers granted to this General Commission by the Royal decree of the 31st May last, and the proper investigation having been made concerning the current freights which this Commission considers must not be the excessive one collected up to date on products which at the present time have the greatest interest for national trade" decreed as follows: "(5.) For goods coming from other countries the following rates shall rule: Jute, 875 pesetas per ton. . . . ."

A Royal decree dated September 14, 1918, provided as follows: "(1.) In the import trade there shall rule as current freights . . . . (*e*) For goods coming from other places the following rates of freight shall rule: Jute, 875 pesetas per ton. . . . ."

The rates of exchange for London bankers' short bills on Barcelona were as follows on the dates specified below :—

July 3, 1918	17.25
Oct. 2, 1918	23.15
Oct. 22, 1918	22.90
Dec. 27, 1918	23.72
Jan. 3, 1919	23.67

The umpire found as a fact that in September, 1918, there came into force in Spain a decree having the force of law fixing the maximum freight on jute at 875 pesetas per ton of 1000 kilogrammes.

The umpire also found as a fact that on April 19, 1919, there had been discharged from the *Eretza Mendi* 23,064 bales of jute, leaving on board at that date a quantity of jute said to be 6274 bales still to be discharged.

The claimants filed their points of claim dated April 17, 1919, and thereby claimed the sum of 96,690*l.* as balance of freight together with interest at the rate of 5 per cent. from December 25, 1918, to date of payment. The claim at the hearing differed in that instead of claiming the balance of freight they claimed damages for breach of the charterparty by non-payment of or refusing to pay the balance of freight, and the claim was so treated in the argument.

The claimants contended, (*a*) that the contract was an English contract to be decided only by English law; (*b*) that the charterers were liable for the freight under the terms of the charter; (*c*) that deposit in Court in Spain was not payment of the freight as required by the charter; (*d*) that while payment under the charter was required in Spain at current rates of exchange on London they were entitled to an award of damages calculated at the rate of exchange at the date of the breach, such damages to be payable in London in sterling.

The respondents filed no points of defence. Their contentions at the hearing were: (*a*) that the ship was not fully discharged and freight was therefore not due; (*b*) that the arbitration was premature in that the matter was still pending in the Spanish Courts; (*c*) that the charterers were only in the position of guarantors; the primary liability was upon the receivers of the cargo; (*d*) that any question arising with regard to the freight and the payment must be governed by the Spanish law; (*e*) that under the charterparty the balance of the freight had to be paid in Spanish currency at the port of discharge and that this payment was prohibited by Spanish law; (*f*) that payment was prevented by restraint of princes; (*g*) that payment had been made by the deposit in Court in Spain of the balance of the freight claimed.

The questions for the opinion of the Court were, (*a*) were the charterers liable for the freight reserved under the charterparty? (*b*) If they were, was that liability discharged by the payment into Court in Spain by the receivers of the cargo? (*c*) If the charterers were not liable for the freight reserved were they liable for the amount which with that part of the freight already paid would amount to 875 pesetas per ton of 1000 kilogrammes? (*d*) If they were so liable was that liability discharged by the payment into Court?

The umpire was of opinion, subject to the opinion of the Court, that the charterers were liable for the freight reserved and that the payment into Court did not discharge them from liability; that they committed a breach of that obligation by refusing to pay the freight as demanded by the owners, and he assessed the damages in respect thereof in the sum of 35,074*l.* 14*s.*, and he directed the charterers to pay that sum in sterling to the owners in London with interest thereon in the meantime at 5 per cent. per annum from the date of the award to the day of payment, and also the costs of the award and the owners' costs of the references.

If the Court should be of opinion that the charterers were liable for the freight reserved but that the liability was discharged by the payment into Court in Spain, then the umpire found that the charterers committed a breach of their obligations and awarded as damages the sum of 137*l.* 0*s.* 8*d.*, being the sum of 41*l.* 1*s.* 11*d.* interest on 50,000*l.* from December 28, 1918, to January 3, 1919, and 95*l.* 18*s.* 9*d.* interest on 23,345*l.* from December 28, 1918, to January 27, 1919, at 5 per cent. per annum, and he directed that the charterers should pay this sum of 137*l.* 0*s.* 8*d.* forthwith in sterling to the owners in London with interest at 5 per cent. per annum from the date of the award to the date of payment, and also the costs of the award.

If the Court should be of opinion that the charterers were not liable for the freight reserved but were liable for freight at the rate of 875 pesetas per ton of 1000 kilos, and that such liability was not discharged by the payment into Court in Spain then the umpire found and awarded that the charterers committed a breach of their obligation when they (or the receivers on their behalf) alleged that the total remaining liability for freight in respect of 29,338 bales of jute was 689 pesetas, and repudiated their liability to pay more, whereas the total liability for freight on such amount of cargo calculated at the rates of exchange ascertained on the various dates of payment was 129,375.50 pesetas, and the umpire awarded as damages in respect of the said breach the sum of 5*l.* and directed that that sum be paid forthwith by the charterers to the owners in sterling in London, and the costs of the award.

If the Court should be of opinion as in the last alternative mentioned but that the charterers' liability was discharged by the payment into Court in Spain, then the umpire found and awarded that the charterers had not committed a breach of their obligation and he directed the owners to pay the costs of the award and the charterers' costs of the reference.

If the Court should be of opinion that the charterers were not liable for the freight reserved under the charterparty nor for freight at 875 pesetas a ton of 1000 kilos, then the umpire found and awarded that the charterers had not committed a breach of their obligation and he directed the owners to pay the costs of the award and the charterers' costs of the reference.

These alternative awards were based on the delivery of 23,064 bales, which the umpire found as a fact, and no one of these alternative awards were to affect the charterers' liability (if any) to pay freight on the balance of the cargo remaining as at April 19, 1919, to be discharged.

Neilson K.C. and *Clement Davies,* for the charterers. The charterparty ought to be construed according to Spanish law as it had to be performed in Spain, the cargo having to be delivered at Barcelona and the balance of the freight paid there to the Spanish owners of a Spanish ship, even although the charterparty was made in London on an English form: see *Jacobs* v. *Crédit Lyonnais* (1) per Bowen L.J. The parties intended to incorporate the foreign law to regulate the method and manner of performance of the contract abroad. Under Spanish law it is illegal for the charterers to pay and the owners to receive a higher rate of freight than 875 pesetas per ton. Therefore both owners and charterers are prevented by the foreign law from performing the contract and consequently the owners cannot sue the charterers for failing to pay more than 875 pesetas per ton: *Ford* v. *Cotesworth* (2); *Cunningham* v. *Dunn.* (3) It was the intention of the parties to perform a legal obligation in Spain. If the charterers paid the balance of the freight in England it would not be a performance of the contract

(1) 12 Q. B. D. 589, 599, 601.

(2) L. R. 5 Q. B. 544.

(3) 3 C. P. D. 443.

in Spain. The charterers are further excused from payment of a higher rate of freight than 875 pesetas per ton by reason of the exception of restraints of princes in clause 2. That exception is a mutual one and enures for the benefit of the charterers as well as of the shipowners. If the clause is not mutual there is no clause in the charterparty to protect the charterers from an absolute liability to load. A very similar clause was held by Mathew J. in *Barrie* v. *Peruvian Corporation* (1) to be mutual. Bigham J. followed that decision in *In re Newman and Dale Steamship Co. and British and South American Steamship Co.* (2) The umpire was wrong in finding that 129,375 pesetas were due from the charterers to the shipowners. In order to arrive at that amount he took the rates of exchange at the various dates when payment of the two sums of 146,690*l.* and 50,000*l.* was made. Those two sums ought to have been calculated at the rate of exchange on the date of the arrival of the ship at Barcelona. The provision in the Spanish law that the rate of freight for jute coming from other countries shall be 875 pesetas per ton applies to the whole freight including that paid in Calcutta.

[Bailhache J. The payments in sterling must be converted into pesetas at the rates of exchange current on the dates of payment.]

The umpire was wrong in fixing damages to be paid in sterling in London; they ought to be paid in pesetas in Spain. It is true that the obligation of the charterers to pay freight to the owners remains, but they are only liable if the receivers are liable and neither the receivers of the cargo nor the charterers are liable to pay freight at a higher rate than 875 pesetas per ton. The payment into Court in Spain amounted, in the circumstances, to payment to the captain.

R. A. Wright K.C. and *Claughton Scott* for the shipowners. The charterparty is an English contract and must be construed according to the English law. Clause 29 provides that any dispute that may arise under the charterparty shall be settled by arbitration to take place in London and that the submission may be made a rule of Court. The contract cannot be construed in part according to English law and in part according to Spanish law. In *Jacobs* v. *Crédit Lyonnais* (1) part of a contract had to be performed in Algeria where French law prevails, but it was nevertheless held that the contract was an English contract and must be construed according to English law. Under the charterparty in the present case the charterers expressly contracted to pay freight at the rate of 50*l.* per ton. The cesser clause, No. 22, has been altered in writing so that the charterers remain liable for freight even after completion of shipment. Although the balance of the freight has to be paid in pesetas in Spain yet it has to be paid upon a sterling basis; payment has to be made in Spain of so many pesetas as will produce at the current rate of exchange the balance of the freight in London. There is an absolute promise by the charterers that the receivers of the cargo will pay the balance of freight at the port of discharge, and the fact that the receivers are prevented by Spanish law from paying the balance of freight affords no answer in law to the charterers who are bound to make good in damages the receivers' breach of contract. The position is like that in *Jacobs* v. *Crédit Lyonnais*, where Bowen L.J. said (2) that "one of the incidents which the English law attaches to a contract is that . . . . a person who expressly contracts absolutely to do a thing not naturally impossible, is not excused for non-performance because of being prevented by vis major." The Court there held that the defendants were not excused from performing their contract to load a cargo by reason of force majeure, although that would have been an excuse by French law, and that they were therefore liable in damages. That decision was applied by McCardie J. in *Blackburn Bobbin Co.* v. *T. W. Allen & Sons.* (3) The price agreed between the charterers and the receivers for the cargo of jute included the freight thereon and the payment by the receivers of one-half the freight was taken into account in reduction of the price. If the

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(1) (1896) 2 Com. Cas. 50.

(2) [1903] 1 K. B. 262.

(1) 12 Q. B. D. 589. (2) 12 Q. B. D. 603.
(3) [1918] 1 K. B. 540.

charterers had sued the receivers for the balance due upon the account they could recover the whole of the price and it would be no answer for the receivers to say that they had not paid the balance of the freight because it was illegal by Spanish law to do so, and yet if the argument in the present case is correct the charterers are not liable to pay the freight to the shipowners. The exception of "restraints of princes" in clause 2 is not mutual; it only enures for the benefit of the shipowners. That is made quite clear from a consideration of the rest of the exceptions in clause 2 which can only apply to the obligations of the shipowners: see *Braemount Steamship Co.* v. *Andrew Weir & Co.* (1) Even if the exception is mutual still it will not prevent the charterers from remaining liable for payment of freight, because they could pay freight otherwise than by paying it at Barcelona. If there are two methods of performing a contract indicated and one method becomes illegal, the contract must be performed in the other way. Even though the method of paying freight in pesetas in Spain has become illegal still as payment has to be made on a sterling basis it must be made in that way. The payment into Court in Spain does not amount to payment of the freight to the shipowners so as to discharge the charterers from liability.

Neilson K.C. in reply. The decision in *Jacobs* v. *Crédit Lyonnais* (2) is distinguishable because there only one party was prevented by the foreign law from performing his part of the contract. In the present case the foreign law prevented both parties performing their contract; there was a joint inability of the parties to perform the contract as in *Ford* v. *Cotesworth* (3) and *Cunningham* v. *Dunn.* (4)

[Bailhache J. Mr. Carver in his work on Carriage by Sea, 6th ed., § 229, criticizes the principle of joint inability as not being applicable to those cases, and says that there were sufficient grounds for the judgments in both cases apart from the doctrine of joint inability.]

The two cases are cited in Anson on Contracts, 14th ed., pp. 242, 387, and also in Dicey's Conflict of Laws, 2nd ed., p. 554, as still being good law for the proposition.

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(1) (1910) 15 Com. Cas. 101.

(2) 12 Q. B. D. 589.

(3) L. R. 5 Q. B. 544.

(4) 3 C. P. D. 443.

Cur. adv. vult.

1919. Dec. 17. BAILHACHE J. read the following judgment. The facts of this case so far as they are relevant to the point submitted to me for decision are these. On July 3, 1918, Messrs. Ralli Brothers, of London, made a charterparty with the Compañia Naviera Sota y Aznar, a company whose headquarters are in Spain, whereby they chartered a Spanish steamship to carry a cargo of jute from Calcutta to Barcelona at a freight of 50*l.* per ton, which worked out on the cargo loaded to about 293,000*l.* Of this sum, one-half was to be paid to the owners in London on receipt of telegraphic advice of steamer's sailing from Calcutta, and the balance was to be paid at Barcelona by the receivers of the cargo, as to one-half on arrival and as to the remainder concurrently with the discharge. The freight payable at Barcelona was to be paid in cash or approved bills at charterers' option at the current rate of exchange for bankers' short bills on London. There was a cesser clause but the charterers' liability to pay freight was preserved. There was also an exception clause to which I will revert later.

The steamship duly sailed from Calcutta and the freight payable on that event was paid, amounting to 146,690*l.* The steamship arrived at Barcelona on December 28, 1918. On July 2, 1918, a circular was issued on behalf of the Spanish Commission of Supplies, a Commission apparently set up under the Spanish Emergency War Legislation, to the effect that freight on jute to Spain was not to exceed 875 pesetas per ton. This was confirmed by Royal Proclamation on September 14, 1918. The freight reserved by the charterparty was largely in excess of 875 pesetas per ton, and the situation on the arrival of the steamship at Barcelona was that the charterers had bound themselves to pay a higher freight than they were by Spanish law entitled to pay, or the owners to receive.

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On these facts the question arises: Were the owners entitled to demand from the charterers the contractual freight, or were they only entitled to demand the freight as limited by Spanish law? The umpire has awarded to the shipowners the contractual freight. In order to answer this question the first point to be decided is: What is the proper law of the contract? That again is a question of intention to be gathered from the circumstances and from the form of the contract. The charterparty was made in London; it is in English, it is on Messrs. Ralli's own form, and it contains an arbitration clause under which disputes are to be decided by commercial men resident in London and the submission may be made a rule of the English High Court. The owners' agents carry on business in London, but the owners are Spaniards, the steamship is Spanish, the port of discharge was Spanish, and the balance of freight was payable there in Spanish currency. There are three possibilities. It may be the law of the flag, or, as performance was to take place in Spain, the law of Spain, which is in this case the same, or it may be English law. The presumption in favour of the proper law of the contract being English is not, I think, nearly so strong as it was in *Jacobs* v. *Crédit Lyonnais* (1), but I will assume that the parties intended English law to apply to the construction of the contract and to the consequences attaching to non-performance. It seems to be considered that the presence of an English arbitration clause and the provision for making the submission a rule of Court are almost conclusive on the point. The charterparty was however to be carried out by discharge of cargo and payment of freight in Spain, and there is considerable authority for saying that with reference to those parts of the contract which are to be performed in Spain the law to be applied is Spanish law, although the proper law of the contract is English, a presumption which is not lessened by the fact that the ship is Spanish, as are her owners: see *Chatenay* v. *Brazilian Submarine Telegraph Co.* (2) There is in my opinion no inconsistency in holding that a contract

(1) 12 Q. B. D. 589.

(2) [1891] 1 Q. B. 79.

is an English contract and to be construed according to English law, but that for some of its incidents the English Courts are to have regard to the law of the country in which those incidents are to take place. Probably the true view is that this charterparty incorporates the law of Spain so far as regards the mode in which any part of it had to be performed in Spain, but that where there has been a failure to perform the contract in Spain the Court in considering whether there has been a breach of the contract or not considers the failure and its consequences from the standpoint of English law and will not admit an excuse which might be valid by Spanish law unless it was also valid in England. This was the decision in *Jacobs* v. *Crédit Lyonnais* (1), where an attempt was made to incorporate into an English contract an exception of vis major upon the ground that under the circumstances of that case the French Courts would have done so.

The next point to be determined is the effect to be given in construing an English contract to a prohibition upon its performance by the municipal law of a foreign country where the prohibited acts were to be performed. If instead of the Spanish Proclamation there had been an English Proclamation limiting freight there would have been a supervening illegality and performance of the contract according to its tenor would have been pro tanto excused. The owners say that no such effect is to be given to the Spanish Proclamation and that it affords no excuse to the charterers for refusing to pay the full freight, although that freight is to be paid in pesetas in Spain. For this they relied on *Jacobs* v. *Crédit Lyonnais.* (1) I have stated what, in my opinion, that case decided, but the decision was so strongly relied upon by counsel for the owners in this case that I prefer to fortify my statement of its effect by a higher authority than I can claim to be. Mr. Dicey in his book on Conflict of Laws, 2nd ed., in dealing with that case says on p. 554: "*Jacobs* v. *Crédit Lyonnais* (1) suggests the conclusion that an English contract to be performed in France, the performance whereof is, at the time when the contract is made, lawful by French law, may be valid in England, even though at the time for the fulfilment of the contract the performance thereof is forbidden by French law. This inference is suggested by the headnote to the report of *Jacobs* v. *Crédit Lyonnais* (1), and by some expressions in the case, but is (it is submitted) erroneous. *Jacobs* v. *Crédit Lyonnais* (1) only decides that a person who enters into an English contract—i.e., a contract governed by the law of England—is not excused for its non-performance in France by circumstances which take place after the contract is made, and afford a legal excuse for non-performance under French, though not under English, law. It does not appear from the case that it would have been illegal under French law to have shipped the cargo, but only that the shipping was prevented by force majeure—namely, by the action of the rebels. This hindrance was a valid excuse according to French law, but not according to English law; hence, in an English Court, it could not be a valid defence for non-performance of an English contract. If the shipment had been a violation of French law this would apparently have been a valid excuse in an English Court for the non-shipment of the cargo—i.e., the non-performance of the contract." In that case the defendant had contracted to ship a cargo of esparto grass from Algeria and had failed to perform his contract because of an insurrection in that country. By French law, such an insurrection amounted to "force majeure," and, by French law, "force majeure" would have been a defence. It was there held that the contract was an English contract. It does not appear that the shipment was illegal by French law, and the case does not, I think, decide that an English Court will enforce under the provisions of an English contract the doing of something in a foreign country which is illegal by the law of the country in which the act is to be done: see particularly the observations of Bowen L.J. (2) What was attempted to be done in that case was to import a vis major clause into

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(1) 12 Q. B. D. 589.

(1) 12 Q. B. D. 589.

(2) 12 Q. B. D. 603.

an English contract which contained no exceptions clause, and would thus be contrary to the canons of construction applicable to an English contract. If Mr. Dicey's statement of the effect of that decision is correct, as I think it is, it obviously does not support the shipowners' contention. The impossibility there was one of actual fact and not of foreign law. There are, however, other authorities in the shipowners' favour. Lord Ellenborough C.J. laid it down in *Barker* v. *Hodgson* (1), that if the performance of the contract had been rendered unlawful by the Government of this country, the contract would have been dissolved on both sides, and the defendant would have been excused for the non-performance of it and not be liable in damages, but if, in consequence of what had happened in a foreign country, the freighter was prevented from furnishing a loading there, which he had contracted to furnish, the contract was neither dissolved nor was he excused from performing it, but must answer in damages. There are other authorities to the same effect, as, e.g., *Sjoerds* v. *Luscombe* (2), and in *Kirk* v. *Gibbs* (3) a plea alleging prevention of loading of cargo by the regulations of a foreign Government was held bad on demurrer. In that case a loading pass was necessary, and the charterers had undertaken to obtain it, and failed to do so. On the other hand, there is authority for the proposition that when the municipal law of a foreign State imposes an equal disability on both contracting parties, neither of them can sue the other although the contract is English: see *Ford* v. *Cotesworth* (4) and *Cunningham* v. *Dunn.* (5) Mr. Carver, in his work on Carriage by Sea, 6th ed., § 229, criticizes the principle of joint inability as applied to these cases, and points out that it might have been applied with equal force in *Barker* v. *Hodgson* (1) and *Sjoerds* v. *Luscombe.* (2) In Scrutton L.J.'s work on Charterparties, 9th ed., it is suggested on p. 327 that *Ford* v. *Cotesworth* (4) and *Cunningham* v. *Dunn* (5) are reconcilable with *Barker* v. *Hodgson* (1) and *Sjoerds* v. *Luscombe* (2) by the presence in the latter cases of a definite time for loading or unloading, and its absence in the former, citing for this a passage from the judgment of Martin B. in *Ford* v. *Cotesworth*. (3) This suggestion is not, I think, in accord with the view taken of *Ford* v. *Cotesworth* (4) in *Cunningham* v. *Dunn*. (5) In that case Brett L.J. says (6): "*Ford* v. *Cotesworth* (4), is in point, and seems to me to decide this case; it establishes that where neither party is ready to perform his undertaking because both are prevented by some superior power, neither party can maintain an action against the other." If this is putting the decision in *Ford* v. *Cotesworth* (4) too high, it was necessary to go that length in *Cunningham* v. *Dunn*. (5) That was an action by charterers against owners for not having the ship *Rainton* ready to load at Valencia. The reason she was not ready was that she had military stores on board. That fact was not a breach of her charterparty, but it would have prevented her loading and rendered her liable to confiscation by the Spanish authorities, and she refused to go to Valencia. Had she gone there the charterers would have been prevented from loading her by Spanish law and she would have been prevented from taking her cargo on board by the same law. There was no exception in the charterparty of restraints of princes and the owners' contractual obligation to go to Valencia was absolute. It was held, however, that as the prevention of loading affected both owners and charterers, the owners were excused from going to Valencia. Cotton L.J. puts the position thus (6): "The charterer cannot say that the ship has not been loaded through the default of her owners; the act of the Spanish Government has prevented the contract between the parties from being carried out." If that case is in point it is a decision of the Court of Appeal and is binding upon me, notwithstanding the criticisms of Mr. Carver and the suggested explanation

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(1) (1814) 3 M. & S. 267, 270.

(2) (1812) 16 East, 201.

(3) (1857) 1 H. & N. 810; 26 L. J. (Ex.) 209.

(4) L. R. 5 Q. B. 544.

(5) 3 C. P. D. 443.

(1) 3 M. & S. 267.
(2) 16 East, 201.
(3) L. R. 5 Q. B. at p. 547.
(4) L. R. 5 Q. B. 544.
(5) 3 C. P. D. 443.
(6) Ibid. 449.

of Scrutton L.J., which does not, I confess, seem to me to fit the case of *Cunningham* v. *Dunn* (1) however satisfactory it may be when applied to *Ford* v. *Cotesworth.* (2) I think *Cunningham* v. *Dunn* (1) is in point and I do not think it necessary to discuss the matter further. Perhaps I may be allowed to summarize my conclusions thus: *Jacobs* v. *Crédit Lyonnais* (3) is a strong authority for holding that the proper law of this contract is English but no authority for the proposition that the municipal law of Spain is no excuse for non-performance in Spain of such parts of the contract as have to be performed there. There is authority for that proposition in *Barker* v. *Hodgson* (4) and cases of that class where the inability to perform the contract owing to foreign law is treated as being that of one of the contracting parties only. There are, on the other hand, the cases of *Ford* v. *Cotesworth* (2) and *Cunningham* v. *Dunn* (1), which decide that foreign law is an answer if it affects both contracting parties alike, and I may add that, as I read the judgments in *Kirk* v. *Gibbs* (5), the Court there would have been of that opinion if the plea had alleged a joint inability. This case falls, in my opinion, within the *Cunningham* v. *Dunn* (1) line of decisions. It is not a case in which the balance of freight is to be paid simpliciter. Freight is to be paid in pesetas in Spain, and in my opinion it would be equally illegal for the owners to demand or receive as for the charterers to pay in Spain a freight in excess of the legal limit. Up to that limit freight must, of course, be paid.

There is, however, another way of looking at the matter. The charterparty contains an exception clause, the second of some thirty-three clauses. It is in these terms: "The act of God, perils of the sea, fire, barratry of the master and crew, enemies, pirates, and robbers, arrests and restraints of princes, rulers and people, or accidents of navigation excepted." It then goes on to enumerate other exceptions solely applicable to the shipowner. If so much of the first

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(1) 3 C. P. D. 443.

(2) L. R. 5 Q. B. 544.

(3) 12 Q. B. D. 589.

(4) 3 M. & S. 267.

(5) 1 H. & N. 810; 26 L. J. (Ex.) 209.

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part of the clause as might be applicable to the performance of the contract by the charterers is mutual, if for example the exceptions of the act of God, perils of the sea and restraints of princes are mutual, the charterers would appear to be protected by their contract whatever be the law applicable to it. The Spanish Proclamation constituted such a restraint. The earlier view was that such exceptions as these only relieved the shipowner and not the charterers. This was Lord Alvanley's opinion in *Touteng* v. *Hubbard* (1) and also Lord Kenyon's opinion in *Blight* v. *Page* (2), and *Sjoerds* v. *Luscombe* (3) is to the same effect. In those days, however, the restraints of princes clause usually occurred in that part of the charterparty which defined the shipowners' duties and not as a separate clause. This was so in *Sjoerds* v. *Luscombe* (3), *Touteng* v. *Hubbard* (1) and *Blight* v. *Page.* (2) In both of the last two cases the further words were added "during the said voyage." In charterparties so framed it was inevitable that the exceptions should be construed as enuring for the benefit of the owner only. The form of charterparty has since then changed and the various duties of owner and charterer are set out in separate clauses as are the exceptions. With this change of form there has been a change in the view taken of their scope and operation, and where they are general and may, or some parts of them may, equally refer to either owner or charterer, they are held to do so. Martin B. was inclined to take this view in *Ford* v. *Cotesworth* (4) where, although the exception, "restraints of princes," formed part of the clause setting out the master's duties, it was followed by the words, "throughout this charterparty." The matter was the subject of decision by Mathew J. in *Barrie* v. *Peruvian Corporation* (5), a decision which was followed, though with doubt, by Bigham J. in *In re Newman and Dale Steamship Co. and British and South American Steamship Co.* (6) In that case the exception of "fire" was held to protect the charterers.

(1) (1802) 3 Bos. & P. 291.
(2) (1801) 3 Bos. & P. 295n.
(3) 16 East, 201.
(4) L. R. 5 Q. B. 544.
(5) 2 Com. Cas. 50.
(6) [1903] 1 K. B. 262.

I venture to think that Bigham J.'s doubts would have disappeared had his attention been drawn to the difference in form between the older charterparties and those in use in 1903. I take it that the law now stands that unless a contrary intention is expressed or is to be gathered from the form of the charterparty, exceptions are mutual where they are contained, as is the modern practice, in one of the numerous separate clauses of a charterparty and do not form part of a clause dealing solely with the obligations of the shipowner or charterer as the case may be. Especially is that the case where as here there is only one set of exceptions and not as in many modern charterparties two sets, one appropriate to the charterers' and one to the owners' obligations. The clause in this charterparty does not differ in any material sense from the clause before Bigham J. except that it contains the words, "and all the above exceptions are conditional on the vessel being seaworthy when she sails." It might be argued that those words show an intention that all the exceptions are in favour of the shipowner only. As I read the clause, however, the words, "all the above exceptions," relate to the exceptions which are included in the long sentence of which they form part and which begins with the words "strandings and collisions." They do not, I think, relate to the earlier sentence in which the words "restraints of princes" appear and which begins with "act of God" and ends "accidents of navigation excepted." In any case the words are a truism and are inserted because of the qualification which follows them.

I have come to the conclusion in a case which I confess to have found very difficult that the position is indistinguishable in principle from *In re Newman and Dale Steamship Co. and British and South American Steamship Co.* (1), that the exception "restraints of princes" is available for the charterers, and that being so I agree with Martin B.'s opinion in *Ford* v. *Cotesworth* (2) that the exception is an answer to the shipowners' claim for freight beyond the limit fixed by the Spanish Proclamation. The charterers' contention that their liability for freight is limited to the sum allowed by the Spanish Proclamation is in my judgment correct both on the doctrine of mutual disability as laid down in *Cunningham* v. *Dunn* (1) and because of the contractual exception of "restraints of princes."

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(1) [1903] 1 K. B. 262.

(2) L. R. 5 C. B. 544.

I decided during the course of the argument that for the purpose of converting the sums paid in sterling into pesetas the rate of exchange must be taken as the rate of exchange on the day of payment or the day on which the payment ought to have been made. It was agreed that no notice was to be taken of the amount paid into Court in Spain. That will be returned to the persons who paid it in. The only point left for my decision was this point as to whether it was a limited rate or the contractual rate.

Judgment accordingly.

Solicitors for charterers: *Pritchard & Sons, for Andrew M. Jackson & Co., Hull.*

Solicitors for shipowners: *Wm. A. Crump & Son.*

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(1) 3 C. P. D. 443.

R. F. S.

GOLDFARB *v.* BARTLETT AND KREMER.

1919
Dec. 17, 18.

[1917. G. 752.]

Bill of Exchange—Partnership—Dissolution—Notice of Dishonour to continuing Partner—Effect on retiring Partner—Giving Time to continuing Partner by taking new Bill—Discharge of retiring Partner—Bills of Exchange Act, 1882 (45 *&* 46 *Vict. c.* 61), *s.* 49 (11.)—*Partnership Act,* 1890 (53 *&* 54 *Vict. c.* 39), *ss.* 16, 17, 38.

Where a bill drawn by partners is dishonoured after the dissolution of the partnership notice of dishonour to the continuing partner is sufficient notice to the retiring partner.

A bill of exchange dated August 11, 1913, and drawn by a partnership firm consisting of two partners B. and K. upon and accepted by a French company was indorsed to the plaintiffs by the two partners on August 21, 1913, in payment of a previously dishonoured bill. On August 27, shortly after the bill of August 11 was given to the plaintiffs, the partnership between B. and K. was dissolved; the assets thereafter belonged to B., who carried on the business in the firm name, B. covenanting with K. to discharge all the debts and liabilities of the firm. Notice of the dissolution and of the fact that B. would discharge the liabilities of the firm was given to the plaintiffs. The bill became due on October 11, 1913, but shortly before that date B. gave to the plaintiffs another bill dated October 1, and payable upon October 31, drawn in the firm name upon and accepted by the same French company for an amount exceeding the amount of the bill of August 11, and at the same time B. asked the plaintiffs not to present the bill of August 11 for payment. The bill of August 11 was notwithstanding presented for payment and dishonoured, and notice of dishonour was given by the plaintiffs to B. The bill of October 1 was also not paid; it was however not noted or protested, and no notice of dishonour was given to either B. or K. The plaintiffs sued K. upon the bill of August 11, and alternatively upon the consideration for the bill:—

Held, that the notice of dishonour of the bill of August 11 which was given by the plaintiffs to B. was a sufficient notice to K. within s. 49 of the Bills of Exchange Act, 1882, notwithstanding that the partnership between them had been previously dissolved, but that K. was not liable on the bill inasmuch as by the terms of the dissolution of partnership and by the notice to the plaintiffs he had ceased to be a principal debtor, and had become a surety only, and had been discharged through the plaintiffs giving time to B. by taking the bill of October 1 in lieu of payment of the bill of August 11; and, further, that K. was also discharged from liability in respect of the bill of August 11 and also in respect of the consideration therefor by reason of the plaintiffs' failure to take the proper steps to enable them to realize their security under the bill of October 1.

TRIAL of action before McCardie J.

The action was brought upon a bill of exchange dated August 11, 1913, for 5355 francs which had been drawn by the defendants upon and accepted by a French company, and which was indorsed by the defendants to the plaintiff. There was also an alternative claim for the consideration in respect of which the bill was given.

The following statement of facts is taken from the judgment.

The plaintiffs, a firm of S. Goldfarb, were bristle merchants carrying on business in London. The defendants, Bartlett & Kremer, were also bristle merchants, and formerly carried on business in partnership in London. Before August, 1913, there had been some dealings between the plaintiffs and the defendants, with the result that a substantial sum of money became due from the defendants to the plaintiffs. In August, 1913, the plaintiffs received from the defendants a bill of exchange dated May 23, 1913, for a sum of about 208*l.*, payable ninety days after sight, which was drawn by the defendants upon a French company called Compagnie Générale d'Entreprises Publiques et Privées, and accepted by that company, and which had been indorsed by the defendants to the plaintiffs for value. The plaintiffs discounted that bill with their bankers. The bill was dishonoured and duly protested. Thereupon the defendants, on or about August 21, 1913, handed to the plaintiffs another bill of exchange for 5355 francs dated August 11, 1913, payable sixty days after date—that is, on or about October 11. The bill was in a similar form to the previous bill, being drawn by the defendants upon the same French company, accepted by that company, and then indorsed by the defendants to the plaintiffs for value. The bill was received by the plaintiffs while the partnership between the two defendants was in full force.

On August 27, 1913, shortly after the receipt of the bill by the plaintiffs, the partnership between the two defendants was dissolved. By the terms of the agreement of dissolution the business carried on by the partnership and all the assets belonging thereto from the date of the agreement belonged to the defendant Bartlett, who was alone entitled to use

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the firm name of Bartlett, Kremer & Co. Kremer went out of the business for a consideration which was paid to him. Clause 1 of the agreement provided that the partnership hitherto subsisting between Bartlett and Kremer should be determined as from the date of the agreement and neither of the parties should be in any way authorized to incur liabilities on behalf of the other from the date thereof. It also provided that notice of the dissolution should be forthwith advertised in the *London Gazette* and notified to the customers and others who had dealt with the firm. By clause 4 Bartlett covenanted with Kremer that he would pay and discharge all debts and liabilities of the firm of Bartlett, Kremer & Co. whether existing or future, and would indemnify Kremer from and against the same and from all claims and demands on account thereof.

Upon the execution of that agreement notice of the dissolution of partnership was duly given to the plaintiffs by a letter dated August 27, which was signed by both Bartlett and Kremer, whereby they informed the plaintiffs that the partnership theretofore existing between them had been dissolved, and that the defendant Bartlett would carry on the business of Bartlett, Kremer & Co. alone under the same name and that he would in due course discharge all the liabilities of the firm and receive all sums due to the firm. The plaintiffs wrote to the defendant Kremer on August 28 in reply to that notice of dissolution of partnership and said that they had entered into certain obligations and had undertaken liability for both Kremer and Bartlett, and that they must continue to hold both jointly and severally liable for those obligations.

Shortly before October 11, 1913, when the bill of August 11 fell due, Bartlett, the continuing partner, saw the plaintiffs and offered them another bill in exchange for the one then current. The bill, which was offered and taken by the plaintiffs, was dated October 1, 1913, and was drawn by the defendant Bartlett in the name of Bartlett, Kremer & Co. upon the same French company as the other bills had been drawn upon, and accepted by that company, and indorsed by Bartlett, Kremer & Co., that is by the defendant Bartlett, who was then carrying on business in that name, to the plaintiffs. The bill was for 5890 francs, and was payable thirty days after date—namely, on October 31, 1913. At the same time Bartlett asked the plaintiffs not to present the bill dated August 11 that was then current. As a matter of fact the bill of August 11 was presented and dishonoured and was returned by the plaintiffs' bankers with a slip attached showing that it had been presented and dishonoured. Thereupon the plaintiffs saw Bartlett and gave him notice of dishonour. McCardie J. held that a notice of dishonour within s. 49 of the Bills of Exchange Act, 1882, was duly given, and that all the proper formalities there required were followed.

The last bill, dated October 1, 1913, payable on October 31, was also not paid. It was however not noted or protested, and no notice of dishonour was given to the defendants.

There was nothing to show that the bills were accepted by the French company as accommodation bills, and McCardie J. drew the inference from the facts before him that they were accepted for value.

The plaintiffs thereupon brought this action against both Bartlett and Kremer. The action was first brought in respect of the bill of exchange dated October 1, 1913. Afterwards the plaintiffs amended their writ, and sued in respect of the bill of exchange dated August 11, 1913; alternatively they sued for the debt in respect of which the bill was given.

The defendant Bartlett was not served with the writ, and he did not appear to defend the action. The defendant Kremer alone defended the action.

Powell K.C. and *Kenelm Preedy* for the plaintiffs. The defendant Kremer is liable to the plaintiffs upon the bill dated August 11, 1913, as it was indorsed to the plaintiffs by the firm of Bartlett, Kremer & Co. while the partnership between Kremer and Bartlett was still subsisting. A partner who retires from a firm does not thereby cease to be liable for partnership debts or obligations incurred before his retirement: see s. 17, sub-s. 2, of the Partnership Act, 1890. When that bill was dishonoured due notice of dishonour was given to the defendant Bartlett, and all the formalities required by the Bills of Exchange Act, 1882, were duly observed. It is true that that notice was given after the dissolution of the partnership, but that is immaterial. It has been held by Channell J. in an unreported case that where a bill drawn by partners is dishonoured after the dissolution of the partnership notice to one partner is sufficient: see Chalmers' Bills of Exchange, 8th ed., p. 182. This is in accord with the New York Negotiable Instruments Law (L. 1909, Ch. 43), s. 170, which provides that "where the parties to be notified are partners, notice to any one partner is notice to the firm, even though there has been a dissolution." The headnote to *Willis* v. *Green* (1) states that "where two persons, not partners, indorse a note payable to their order, they cannot be made liable unless notice of non-payment be given to each; though otherwise, if they be partners." Although there is no reported decision to the same effect in England there are dicta which point to that conclusion. Heath J. in *Wood* v. *Braddick* (2) said "that when a partnership is dissolved, it is not dissolved with regard to things past, but only with regard to things future. With regard to things past, the partnership continues, and always must continue." Patteson J. in *Hills* v. *Thorowgood* (3) also said: "This bill was a partnership transaction, and if the partnership had been dissolved, the partners would each remain liable upon it, and the admission of one after the dissolution, would be evidence against the other." Kremer by the agreement of dissolution of partnership left Bartlett to wind up the affairs of the partnership, and therefore Bartlett had authority under s. 38 of the Partnership Act, 1890, notwithstanding the dissolution of partnership, to bind the firm and the rights and obligations of Kremer so far as might be necessary to wind up the affairs of the partnership and to

(1) (1843) 5 Hill, 232 (New York).
(2) (1808) 1 Taunt. 104, 105.
(3) (1836) 5 L. J. (K. B.) 214, 215.

complete transactions begun but unfinished at the time of the dissolution, and therefore he had authority to give the bill of October 1 instead of paying the bill of August 11, and the notice of dishonour that was given by the plaintiffs to Bartlett is a good notice as against Kremer and he is accordingly liable on the bill.

Giveen for the defendant Kremer. This defendant is not liable upon the bill of August 11, 1913, as no notice of dishonour was given to him. The notice of dishonour that was given by the plaintiffs to Bartlett is not a good notice of dishonour as against Kremer, as the partnership had been dissolved to the knowledge of the plaintiffs at the time the notice was given. Sect. 49, sub-s. 11, of the Bills of Exchange Act, 1882, provides that "where there are two or more drawers or indorsers who are not partners, notice must be given to each of them." There is no authority for the proposition that the continuing partner after the dissolution of the partnership is the agent of the retiring partner to accept a notice of dishonour or a protest. The deduction to be drawn from the judgment of Lord Herschell in *Rouse* v. *Bradford Banking Co.* (1) is that there is no such implied authority. By the agreement of dissolution of partnership it was agreed between Bartlett and Kremer that Bartlett should take over the liabilities of the partnership. Notice of that agreement was given to the plaintiffs, and from that time Kremer became a surety only instead of being a principal debtor, and the plaintiffs were bound to do nothing to prejudice his interest by giving time to the principal debtor, otherwise his liability as surety was discharged: *Rouse* v. *Bradford Banking Co.* (1); Lindley on Partnership, 8th ed., p. 271. The plaintiffs knew that Kremer was only in the position of surety, and he is discharged by the plaintiffs' dealing with Bartlett after the dissolution of the partnership, as the taking by the plaintiffs of the bill of October 1 amounted to the giving of time to Bartlett. The plaintiffs knew that the partnership had been dissolved, and that Bartlett, Kremer & Co. was the name under which Bartlett traded. The

(1) [1894] A. C. 586.

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authority of Bartlett was to discharge the obligations of the partnership by meeting the bill of August 11, 1913. He had no authority to deal with the bill in any other way. Bartlett had no authority in winding up the affairs of the partnership to give the bill of October 1 so as to bind Kremer: *Kilgour* v. *Finlyson.* (1) The plaintiffs by taking the bill of October 1 from Bartlett and at the same time keeping the bill of August 11 in their hands, thereby gave time to Bartlett, because it amounted to an agreement that the bill of August 11 should not be enforced. Kremer, who was in the position of surety, was accordingly discharged from liability: *Gould* v. *Robson.* (2) The plaintiffs by failing to present the bill of October 1 for payment or, if it was dishonoured, to give notice of dishonour, thereby discharged the other parties to the bill from liability on the bill of August 11 and also on the debt or other consideration for which the bill was given: *Soward* v. *Palmer* (3); *Peacock* v. *Purssell* (4), and therefore Kremer is discharged from liability upon the earlier bill of August 11 for the discharge and payment of which the bill of October 1 was given and accepted.

Powell K.C. in reply. If notice of dishonour might be given to Bartlett so as to bind Kremer, Bartlett might also waive the necessity for the giving of the notice so as to bind Kremer. The taking by the plaintiff of the bill of October 11 in no way prejudiced the rights of Kremer. In order that Kremer should be discharged from liability there must be novation of the debt, and there was no novation. The case of *Rouse* v. *Bradford Banking Co.* (5) depended upon its own peculiar facts and is no authority in the present case.

McCARDIE J. This case raises points of intricacy and commercial importance, and it has been most ably argued by counsel on both sides. [His Lordship stated the facts set out above, and continued:]

The first point that arises for decision is this. Mr. Giveen contended that no notice of dishonour of the bill dated

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(1) (1789) 1 H. Bl. 155.
(2) (1807) 8 East, 576.
(3) (1818) 8 Taunt. 277.
(4) (1863) 32 L. J. (C. P.) 266.
(5) [1894] A. C. 586.

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August 11, 1913, was in fact given to the defendant Kremer. That fact is correct, and the question therefore arises whether the notice of dishonour that was given by the plaintiffs to the defendant Bartlett after the dissolution of the partnership between him and Kremer in respect of a partnership bill of exchange given before the dissolution is a notice not only to Bartlett but also to Kremer. That is a point of some practical importance.

Several sections of the Partnership Act, 1890, may be briefly referred to. Sect. 16 provides that "notice to any partner who habitually acts in the partnership business of any matter relating to partnership affairs operates as notice to the firm, except in the case of a fraud on the firm committed by or with the consent of that partner." That section prima facie refers to an existing operative partnership. Sect. 17, sub-s. 2, states that "a partner who retires from a firm does not thereby cease to be liable for partnership debts or obligations incurred before his retirement." Incidentally I may also mention s. 15, which says that "an admission or representation made by any partner concerning the partnership affairs, and in the ordinary course of its business, is evidence against the firm." That section also on the face of it refers to an existing operative partnership. Then comes a section of considerable importance. Sect. 38 provides that "after the dissolution of a partnership the authority of each partner to bind the firm, and the other rights and obligations of the partners, continue notwithstanding the dissolution so far as may be necessary to wind up the affairs of the partnership, and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise." Mr. Powell has relied upon that section, and claims that it is in consonance with the course of decided authority. I may also refer to s. 49, sub-s. 11, of the Bills of Exchange Act, 1882, which provides that "where there are two or more drawers or indorsers who are not partners, notice must be given to each of them, unless one of them has authority to receive such notice for the others." These are the only statutory provisions I need refer to. The question is therefore whether a notice of dishonour given to a continuing partner after the dissolution of the partnership binds the partners who have retired from the partnership. There seems to be no express reported decision on the point, but there are certain authorities which seem to indicate that such a notice would bind the partner who has retired. There are observations by Mansfield C.J. and Heath J. in *Wood* v. *Braddick* (1) which, although not directly in point, still point to the conclusion that a retiring partner is bound by notice given to the continuing partner. There are similar observations by Patteson J. in *Hills* v. *Thorowgood* (2), and there are also observations which point to the like result in *Willis* v. *Green* (3). In my view both convenience and principle support the conclusions indicated in the decisions to which I have referred. I find that the point has apparently arisen before because it is stated in the notes to Chalmers' Bills of Exchange, 8th ed., p. 182, that notice to one partner after dissolution is sufficient, and an unreported decision of Channell J. is cited as authority for the proposition. I think the decision of Channell J., although unreported, is supported by the authorities already cited, and I hold that notice to one partner is adequate as notice to both the partners who had previously been carrying on business together in partnership. That is the first point in the case.

Mr. Giveen has raised a number of other points and has argued them with great clearness and force. The next submission that he made was that by reason of the notice of dissolution of partnership given to the plaintiffs on August 27, 1913, coupled with the actual dissolution created by the document of that date between the parties, the plaintiffs were fixed with notice that the defendant Kremer became a surety only as from the date of the dissolution. In support of that proposition he cited the case of *Rouse* v. *Bradford Banking Co.* (4) In my opinion that submission is correct. The substance of the decision upon the legal principle involved is stated very clearly in the headnote, as follows: "Where

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(1) 1 Taunt. 104.
(2) 5 L. J. (K. B.) 214.
(3) 5 Hill, 232 (New York).
(4) [1894] A. C. 586.

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two or more are indebted as principals and it is afterwards agreed between them that as between themselves one shall be a surety only, and this agreement is made known to the creditor, the rule as to the discharge of a surety by giving time to the principal debtor applies." The result of that decision is that Kremer after August 27, 1913, was a surety only. Then arises a further submission by Mr. Giveen—namely, that Kremer has been discharged as surety by reason of several circumstances. The first circumstance relied upon by Mr. Giveen was that the plaintiffs after the dissolution of the partnership took from the defendant Bartlett a fresh bill of exchange—namely, the bill dated October 1, 1913—which became due on October 31, 1913, and which the plaintiffs received shortly before the date on which the bill of August 11, 1913, which is sued upon in this action, was dishonoured. They did undoubtedly receive that bill, which was perfect in form and given for value. I observe that when this action was commenced the plaintiffs actually sued upon the bill of October 1, although they afterwards amended and sued upon the earlier bill dated August 11. The effect of the plaintiffs renewing the bill of August 11, in my opinion, was that the plaintiffs by necessary implication gave time to the defendant Bartlett in respect of the payment of the bill of August 11. They could not sue upon the two bills at the same time; the one excluded their remedy upon the other. While the second bill was running they could not in my view sue upon the earlier bill. In support of that contention Mr. Giveen cited *Gould* v. *Robson* (1), which case I think amply supports the proposition he put forward. The position is correctly stated in Chalmers' Bills of Exchange, 8th ed., pp. 251–2, as follows: "The holder of a bill takes from the acceptor in lieu of payment a new bill payable at a future day, to which the drawer and indorsers are not parties. This discharges the drawer and indorsers." It matters not in my opinion in what way the giving of time is effected, whether it be by covenant not to sue for a given period or whether it be by agreement not under seal not to sue for

(1) 8 East, 576.

a given period, or whether it be by accepting a new bill. The matter is clearly put by Rowlatt J. in his work on Principal and Surety at p. 244, where he says: "It is immaterial what form the giving time takes, so long as there is a binding agreement by the creditor to suspend his rights. Thus, agreeing to take payment by instalments, taking a bill or note payable on a future day, or obtaining judgment by consent with a stay of execution beyond the date when in the regular course judgment could have been obtained, discharges the surety." In my view therefore the act of the plaintiffs in taking the bill of October 1 in the circumstances amounted to the giving of time to the defendant Bartlett, and therefore discharged the defendant Kremer, who was only in the position of a surety. If it had been necessary to do so I should have also accepted a further proposition of Mr. Giveen to the effect that the conduct of the plaintiffs with regard to the bill of October 1 amounted to the destruction of the property they possessed, and to the benefit of which the surety was entitled. The plaintiffs did nothing in respect of that bill, and took no steps by way of realizing the assets they possessed. The result was that their rights against Kremer upon the bill of August 11 were entirely gone. For this proposition Mr. Giveen cited *Soward* v. *Palmer* (1) and *Peacock* v. *Purssell* (2). I think that those authorities show that not only is the remedy upon the earlier bill gone, but also that the right to sue upon the consideration for that earlier bill is likewise gone. Nowhere is this stated more clearly than in Leake on Contracts, 5th ed., at p. 635. It must be observed that the defendants were not the acceptors of the bill but the drawers and indorsers, and therefore they were only secondarily liable. The way it is put in Leake is as follows: "If the debtor is only secondarily liable, as drawer or indorser, the delivery of the bill is a sufficient prima facie answer to the claim; and it lies upon the creditor to account for the non-payment in a way to revive the liability of the debtor; for as holder of the bill he is bound to take all steps necessary to obtain payment and to preserve the rights of his

(1) 8 Taunt. 277.

(2) 32 L. J. (C. P.) 266.

debtor upon it, as due presentment for payment and notice of dishonour; in default of which, where it is necessary, the latter is discharged not only from his liability upon the bill, but also from the original debt," and the appropriate authorities are cited in support of that proposition. I desire to add only one thing further—namely, that although I have held that one partner may receive after the dissolution of the partnership notice of dishonour that will bind the other partner, I have great doubt after hearing Mr. Giveen's argument whether the continuing partner has authority to waive the presentation of the bill or the protesting of the bill or notice of dishonour. That question will require further consideration when it arises for decision. The result is that there must be judgment for the defendant Kremer.

Judgment for defendant.

Solicitors for plaintiffs: *Swepstone, Stone, Barber & Ellis.*
Solicitor for the defendant Kremer: *Arthur S. Joseph.*

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ATTORNEY-GENERAL, APPELLANT v. BEAUCHAMP, RESPONDENT.

Printer—Published Paper—Issue of, not bearing Name of Printer—Penalty—Liability of Publisher—2 & 3 Vict. c. 12, s. 2.

By s. 2 of 2 & 3 Vict. c. 12, "Every person who shall print any paper .... which shall be meant to be published or dispersed and who shall not print upon .... such paper .... his or her name and usual place of abode or business, and every person who shall publish or disperse .... any printed paper .... on which the name and place of abode of the person printing the same shall not be printed as aforesaid, shall for every copy of such paper so printed by him or her forfeit a sum not more than 5*l.*"

The respondent, who was the publisher of a newspaper, sold and delivered to a purchaser certain copies of the said paper on which the name and address of the printer were not printed. The respondent was not the printer of the paper:—

Held, that the respondent, as being the person publishing the said copies, was liable to penalties under the section even though he was not the printer, and notwithstanding the fact that the words "or published" did not occur in the last line of the section before the words "by him or her."

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CASE stated by the London quarter sessions.

The respondent, Joan Beauchamp, was convicted before a Metropolitan police magistrate for having on July 29, 1918, unlawfully published twenty-five copies of a printed paper, to wit the issue dated July 4, 1918, of a newspaper called *The Tribunal*, on which printed paper there was not then printed the name and usual place of abode of the person who printed the same, contrary to the provisions of 2 & 3 Vict. c. 12, s. 2, and the Newspapers, Printers, and Reading Rooms Repeal Act, 1869 (32 & 33 Vict. c. 24), s. 1. (1), and she was thereupon adjudged to pay a fine of 2*l.* for each of the twenty-five copies so published by her. Against that conviction she appealed to the quarter sessions, who allowed the appeal subject to a case for the opinion of the High Court.

Upon the hearing of the said appeal the following facts were proved:—

The respondent was the publisher at 5, York Buildings, Adelphi, London, of a weekly newspaper called *The Tribunal*. On July 29 a police constable, acting on instructions, went to 5, York Buildings, and there purchased, with the authority of the respondent, twenty-five copies of the issue of the said newspaper dated July 4, 1918. On each copy were printed the following words: "Printed by J. Beauchamp, of Chalk Pit Cottage, Norbury Park, near Dorking, and published at 5, York Buildings, Adelphi, W.C." The said facts were reported by the Director of Public Prosecutions to the Attorney-General, who authorized the prosecution of the respondent under the sections above mentioned. (2) The respondent was not the printer of the twenty-five copies of the said paper, she was the person who published them, and the said copies had not thereon the name and usual place of abode of the printer. The Court of quarter sessions held that there was no penalty provided by the said sections for publishing a printed paper on which the name and abode of the printer are not printed unless the person publishing was also the printer, and they accordingly quashed the conviction.

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(1) The Act 32 & 33 Vict. c. 24, repeals the whole of 2 & 3 Vict. c. 12, except s. 2, which it expressly keeps alive. It also provides that "all such remedies may be had and continued in the same manner as if this Act had not passed," notwithstanding the repeal of s. 4.

(2) By s. 4 of the Act 2 & 3 Vict. c. 12, no proceedings for the penalties imposed by that statute are to be commenced except in the name of the Attorney or Solicitor-General.

Sir Archibald Bodkin and *G. A. Branson* (*Sir Gordon Hewart, A.-G.* with them) for the appellant. One object of the 2 & 3 Vict. c. 12 was to impose a penalty on the person publishing a printed paper which did not bear the name and address of the printer whether he had also printed it or not. This seems clear from the marginal note to s. 2, which runs: "Penalty upon printers for not printing their name and residence on every paper or book, and on persons publishing the same;" though, perhaps, the Court is not entitled to look at the marginal note for the purpose of construing the section. But apart from the marginal note it is obvious that that was the meaning of the section, and that in the sentence "for every copy of such paper so printed by him or her" the words "or published" are accidentally omitted after the words "so printed." Moreover light is thrown on the question by the earlier legislation on this subject. By s. 27 of 39 Geo. 3, c. 79, it was provided that "Every person who shall omit to print his name and place of abode on every paper or book printed by him, and also every person who shall publish or disperse" any paper or book not bearing the name and address of the printer "shall for every copy of such paper so published or dispersed by him" pay a penalty. That section is the converse of the present, as it in terms omits to impose a penalty on a printer who is not also the publisher. But in an amending Act of 51 Geo. 3, c. 65, it is provided by s. 1 that "Nothing in the 27th section of the said Act contained shall extend to make any person or persons offending against the same, liable to more than twenty-five forfeitures or penalties for printing or publishing, or dispersing

. . . . any number of copies of one and the same paper or book, contrary to the said section of the said Act." That amounts to a statutory declaration that in construing s. 27 the words "so published or dispersed by him" must be read as if they were "so printed or published or dispersed by him." Similarly the words "or published" must be read into the present section to supply the omission. "It is," as Lord Hobhouse said in *Salmon* v. *Duncombe* (1), "a very serious matter to hold that when the main object of a statute is clear, it shall be reduced to a nullity by the draftsman's unskilfulness or ignorance of law." And in *Rex* v. *Vasey* (2) Lord Alverstone refers to "the principle that the manifest intention of a statute must not be defeated by too literal an adhesion to its precise language." In some cases the Court has filled up a lacuna in a statute by supplying words which were not there. Thus in *Williams* v. *Evans* (3), where the appellant was convicted of furiously riding a horse on a highway under s. 78 of the Highway Act, 1835, which enacts that "If any person riding any horse or beast, or driving any sort of carriage, shall ride or drive the same furiously . . . . every person so offending . . . . shall for every such offence forfeit any sum not exceeding 5*l.* in case such driver shall not be the owner of such wagon, cart, or other carriage, and in case the offender be the owner of such wagon, cart, or other carriage, then any sum not exceeding 10*l.*" the Court affirmed the conviction notwithstanding that the word "rider" was not mentioned in the penal part of the clause. They read in the word "rider" in order to avoid a manifest absurdity. In *Reg.* v. *Kingsby* (4) a baker was convicted under the Bread Act (6 & 7 Will. 4, c. 37) for refusing to weigh in the presence of the purchaser bread sold by him in his shop. By s. 6 a baker was required to keep scales and weights in his shop, but there was no provision compelling him, when selling bread in the shop, to weigh the bread in the customer's presence. By s. 7 every baker who carried bread round in his cart for sale was required to carry scales and weights with him and to use them if requested by the purchaser to do so, and a penalty was thereby imposed if he refused to do so. The Court read the provisions of s. 7 into s. 6 and upheld the conviction. So too a Court will disregard words in a section where a literal construction of them would defeat the plain intention of the Legislature: *Rex* v. *Ettridge.* (1)

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(1) (1886) 11 App. Cas. 627, 634.

(2) [1905] 2 K. B. 748, 751.

(3) (1876) 1 Ex. D. 277.

(4) (1851) 15 J. P. 65.

Slesser for the respondent. Penal statutes must be construed with exceptional strictness, and if in the language of such a statute there occurs an omission, however obvious, it is for the Legislature to supply it and not for the Court. Of this *Underhill* v. *Longridge* (2) is an illustration. There the owners of a coal mine, in which a serious personal injury arose from an explosion, were convicted of neglecting to give notice of the accident to the inspector of the district under s. 9 of 18 & 19 Vict. c. 108, which enacts that "if and when loss of life to any person employed in or about any coal mine or colliery occurs by reason of any accident within such coal mine or colliery . . . . or if any serious personal injury arises from explosion therein, the owner or agent of such mine or colliery shall, within twenty-four hours next after such loss of life, send notice of such accident to the inspector of the district." There it was perfectly obvious that after the words "such loss of life" there was an accidental omission of some such words as "or such serious personal injury," for otherwise the provision became largely inoperative; but the Court held that they could not take upon themselves the office of the Legislature and were not entitled to read those words into the section, and they accordingly quashed the conviction. But further there is in the present case no reason to suppose that there is any omission at all. The language of the Act can be satisfied and given effect to as it stands by supposing the portion of the section dealing with the person publishing to refer to a person who is both printer and publisher, the intention being that the printer should be liable to one penalty, and that if he increased the offence by also publishing he should be liable to a second.

Branson in reply.

(1) [1909] 2 K. B. 24.

(2) (1859) 29 L. J. (M. C.), 65.

Lord Coleridge J. This case raises the question of the proper interpretation to be put on s. 2 of 2 & 3 Vict. c. 12. That section enacts that "Every person who . . . . shall print any paper or book whatsoever, which shall be meant to be published or dispersed and who shall not print upon . . . . such paper . . . . his or her name and usual place of abode or business, and every person who shall publish or disperse . . . . any printed paper or book on which the name and place of abode of the person printing the same shall not be printed as aforesaid, shall for every copy of such paper so printed by him or her forfeit a sum of not more than *5l.*" In this case the person who published the paper was not the person who printed it, and the objection was taken that such a person could not be convicted under the section except by straining its language or adding words to it which were not there. Unquestionably, when one is construing a penal statute, the first thing is to construe it according to the ordinary rules of grammar, and if a construction which satisfies those rules makes the enactment intelligible, and especially if it carries out the obvious intention of the Legislature as gathered from a general perusal of the whole statute, that grammatical construction ought not to be departed from. It is only in the event of difficulties arising from such a construction that any questions as to the propriety of adding words can arise. In the case of the section before us I do not think that a strictly grammatical construction does give rise to any such difficulties, and consequently in my view it becomes unnecessary to consider whether or not we ought to add the words "or published" before the words "by him or her." The section begins with the words "Every person who shall print any paper" without the name of the printer shall pay a penalty "for every copy . . . . so printed by him." It then goes on to deal with another class of persons, the publishers, and says that "every person who shall publish" such a paper shall forfeit a similar sum for every copy so printed by him," and it is contended that unless the person publishing was also the printer he is not within the penal words of the section. But I think the strictly grammatical construction of that sentence is to read the words "by him or her" as referring to the last person previously mentioned, that is, "the person so printing the same," so that the section must be understood as meaning that the person publishing a paper which does not bear the printer's name "shall for every copy of such paper so printed by the person printing the same" forfeit the sum specified. So read the section imposes the penalty on both classes of offenders, on the publisher in respect to the copies which he publishes as well as the printer. I think the Court below were wrong in supposing that the section struck at the publisher only where he was also the printer. In my opinion this appeal should be allowed.

ROWLATT J. I am also of opinion that this appeal should succeed, but not upon the same grounds. The view which I take involves a much smaller measure of liability than that involved by the view to which my Lord has just given expression. I concede that it is grammatically possible to read the words "by him or her" as referring to the person "printing the same," but I do not think that is the natural meaning. When in reading the section you come to the words imposing the penalty on the offenders—"shall for every copy of such paper . . . . forfeit"—you expect to find the penalty measured with reference to the offence committed by the person who is being charged, the printer or the publisher as the case may be, whereas the view which my Lord has adopted is that every publisher is liable for the whole number of copies printed although he only publishes one. I do not think we should be justified in giving such a wide penal effect to the words, or making the amount of one man's penalty depend upon the degree of the offence committed by another. I prefer the other contention put forward for the appellant, that into the passage "so printed by him or her" you should introduce the words "or published or dispersed," with the effect that the publisher would only be liable for the number of copies that he himself published and not for the whole number printed. Speaking for myself I think there is no difficulty in reading the section in that way. It says first "every person who prints," and secondly "every person who publishes," and then goes on at the end "shall forfeit." When you get to that last sentence you are driven by the manifest intention of the section to expect a forfeiture imposed on both the classes of persons who have been mentioned—namely, printers and publishers—but you find the forfeiture imposed in terms only on one, the second class being left entirely in the air, and that is manifestly absurd because it gives no effect at all to the middle part of the section dealing with publishers. Now I think the cases cited by Sir Archibald Bodkin, especially *Williams* v. *Evans* (1), amply justify that way of construing the section. It is not really a question of adding anything to the section, for it is quite clear what the intention was, and the omission of certain words that you would expect to find there is nothing more than a faultiness of expression. I think as good a way as any of expressing my meaning is to treat the word "printed" as representative of all the classes of offences with which the section is intended to deal—namely, printing, publishing and dispersing. I am bound to admit that the case cited by counsel for the respondent (*Underhill* v. *Longridge* (2)), is opposed to this way of construing the section, but I prefer to follow *Williams* v. *Evans* (1). That this construction will carry out the obvious intention of the Legislature appears clearly from the previous legislation on this subject, because in the earliest Act, that of 39 Geo. 3, c. 79, precisely the same fault of wording occurs, only it is the other way about—that is to say, it says "so published" instead of "so printed"; and when Parliament came to deal with the matter in the later Act of 51 Geo. 3, c. 65, and to impose a limitation on the penalties enacted by the former Act, it interpreted the language used in it to have precisely the same effect as that which in my judgment the section which we are now considering ought to have—that is to say, it adopted the very same means of getting over a similar difficulty as that which I have ventured to adopt in the present case. It only remains

(1) 1 Ex. D. 277.

(2) 29 L. J. (M. C.) 65.

to mention one other point which was made by the counsel for the respondent. He said that all difficulty could be obviated by reading the part of the section which strikes at the person publishing as imposing an additional penalty on the person printing if he also publishes. But I do not think that that suggestion can be accepted, because when you get the words "every person who shall print" and "every person who shall publish" I think it is perfectly obvious that two distinct categories of persons are struck at and two different offences are created. My Lord tells me that he did not intend his judgment to have the result that a person who published copies of a paper would be liable to a penalty for all the copies printed by the printer whether published or not.

McCardie J. I agree with the judgment of my Lord as to the effect of this section. I conceive that its object is made plain by the two earlier statutes of George 3. It deals with two distinct classes of persons, the printers and the publishers. It is perhaps not worded with aptness, but in my view its wording carries out with reasonable clearness the object of Parliament in passing it. It provides, first, that every person who prints a paper or book which is intended to be published shall put his name and address upon it, and if he omits to do so he is to be liable to a penalty; and secondly it provides that every publisher of such a paper or book shall also be liable to a penalty if he sends it out without the required imprint upon it. In my view it is clear that the person so publishing is not to be liable for the whole number of the copies printed by the printer, but only for the copies which he himself has actually published. That seems to be the reasonably plain meaning of the section which we have to consider, while it is in agreement with the earlier legislation on the subject.

Appeal allowed.

Solicitor for the appellant: *Solicitor to the Treasury.*
Solicitors for the respondent: *Pattinson & Brewer.*

J. F. C.

[IN THE COURT OF APPEAL.]

1920
Jan. 13.

GRIEBART *v.* MORRIS.

[1919. G. 1321.]

Practice—Discovery—Interrogatories—Action to recover Damages for personal Injuries—Alleged Rule of Practice not to allow Interrogatories—Order XXXI., *rr.* 1, 2.

There is no general rule of practice in the King's Bench Division that interrogatories are not to be allowed in a running-down case. Only such interrogatories however should be allowed as may be necessary for disposing fairly of the cause or matter or for saving costs within Order XXXI., r. 2.

The plaintiff brought an action against the defendant to recover damages for personal injuries caused by the alleged negligent driving of the defendant's motor car. The statement of claim alleged that the defendant's servant so negligently drove the motor car that it knocked down and severely injured the plaintiff who was crossing the road after alighting from an omnibus travelling in the opposite direction to that in which the motor car was being driven. The particulars of negligence stated that the car was being driven on the wrong side of the road and at an excessive speed, and passed too close to the stationary omnibus from which passengers were alighting, no warning being given of its approach. The defence denied negligence, and alleged contributory negligence. The plaintiff, who was unable to find any witnesses on her behalf who saw the accident, and who in consequence of her injuries had a faulty recollection on the matter, applied for leave to deliver interrogatories asking in substance what were the positions of the omnibus and motor car at the time of the accident and how far the plaintiff was from the omnibus and from the kerb on either side of the road. The master refused leave on the ground that there was a general rule of practice not to allow interrogatories in running-down cases except for special reasons. The judge affirmed the refusal, but gave leave to appeal:—

Held, that there was no such rule of practice as suggested, and that in the circumstances the interrogatories were necessary for disposing fairly of the action within the meaning of Order XXXI., r. 2, and should be allowed.

APPEAL from an order of Bailhache J. in chambers.

The action was to recover damages for personal injuries owing to the alleged negligence of the defendant's servant in driving the defendant's motor car.

The statement of claim alleged (so far as material): "On May 2, 1919, the defendant's servant so negligently drove and managed a motor car in the Finchley Road while travelling from the direction of Golders Green towards London that he knocked down and severely injured the plaintiff who was crossing the road, having just alighted from an omnibus travelling in the direction opposite to that in which the defendant's car was being driven. The plaintiff has thereby suffered damage.

"PARTICULARS OF NEGLIGENCE.

"Driving on the wrong side of his road and at an excessive speed having regard to the circumstances present; passing too close to a stationary omnibus from which passengers were or might be alighting; not keeping a proper look-out or giving warning of his approach when about to pass a stationary omnibus.

"PARTICULARS OF INJURIES.

"Severe concussion, fracture of the skull about the cribriform plate, extensive bruising on the head, elbows and other parts of the body, an open wound on the left leg and heel."

The defence (so far as material) was as follows: "1. The defendant denies each and every of the acts of negligence alleged in the statement of claim and says that the plaintiff's alleged injuries were not occasioned by reason of the alleged or any want of care on the part of the defendant or his servant.

"2. The plaintiff was guilty of contributory negligence in that she, without first seeing if she could safely do so, passed into the roadway from the back of another vehicle immediately in front of the defendant's approaching car so as not to afford the defendant's driver an opportunity of pulling up or taking any other measures to avoid the plaintiff being struck by the car."

The plaintiff applied for leave to administer to the defendant interrogatories, ten in number, of which the plaintiff, when the case was in the Court of Appeal, only asked that four should be allowed. These four were the following: "1. At or immediately before the time when your car struck the plaintiff were you not passing an omnibus? 4. Was the said omnibus standing close to the near side kerb, or how far from the said kerb was the said omnibus ? 6. State how far the plaintiff was at the time your car struck her, (*a*) from the said omnibus, (*b*) from the kerb on your off side, (*c*) from the kerb on your near side. 7. In what position in the road was your car being driven immediately before passing the said omnibus ? "

The plaintiff was unable to find any witnesses of the accident, and she herself was so seriously injured that she might be unable to give a full account of the position when the accident happened. She therefore applied for leave to administer the interrogatories.

The Master refused leave on the ground that there was a general rule of practice in the King's Bench Division not to allow interrogatories in running-down cases except for special reasons. Bailhache J. affirmed the order of the Master, but gave leave to appeal. The plaintiff appealed. Upon the appeal the plaintiff, as already stated, confined her application to the four interrogatories set out above.

Rayner Goddard for the plaintiff. There is no rule of practice against allowing interrogatories in a running-down case. The right to interrogate is founded on Order XXXI., rr. 1, 2, where the only limitation of the power of the Court is that the interrogatories must be necessary for disposing fairly of the cause or matter, or for saving costs. In the present case the plaintiff cannot find any person who saw the accident apart from those who were in the defendant's car, and therefore she is not in a position to call any independent witnesses, and her own memory of the details of the accident will probably prove to be defective owing to the suddenness of the accident and to her being seriously injured and rendered unconscious. One person has just been found who assisted the plaintiff after the accident, but it is not known yet whether she can give any evidence as to the accident. This is a proper case in which interrogatories should be allowed, and the plaintiff only asks to be allowed to deliver interrogatories 1, 4, 6 and 7.

W. Shakespeare for the defendant. In the first place, the Court will not interfere with the order of the judge in chambers, "unless there is some strong reason in point of principle for so doing, as, for instance, where what the judge has done appears to the Court to involve a violation of some rule which has been so often recognized as to have become an unwritten law of practice on the subject": per Vaughan Williams L.J. in *Knapp* v. *Harvey.* (1) See also *Maass* v. *Gas Light and Coke Co.* (2); *Birmingham and Midland Motor Omnibus Co.* v. *London and North Western Ry. Co.* (3). There is no ground here for interfering with the discretion exercised by the judge, in so far as he exercised a discretion.

Secondly, there is a rule of practice in the King's Bench Division not to allow interrogatories in a running-down case in the absence of special circumstances. In the present case there are no special circumstances. The interrogatories either ask what the plaintiff knows, or are of a "fishing" character. As Lord Esher M.R. said in *Marskell* v. *Metropolitan District Ry. Co.* (4): "The interrogatory asked the defendants, amongst other things, what was the plaintiff's position when the accident happened. That question was asked by a man who knew better than anyone else what his position was. It was the foundation of his whole case. Unless the plaintiff knew what his position was he had no right to bring the action. He, in fact, asked the defendants to tell him what his own evidence was." The first and fourth interrogatories ask something which is perfectly well known to the plaintiff if she has any case at all. Interrogatories 6 and 7 seek to find out something which may enable the plaintiff to make a case of which she has no knowledge at present, and come within the description of "fishing" interrogatories: *Hennessy* v. *Wright.* (5) The learned judge was therefore right.

No reply was called for.

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(1) [1911] 2 K. B. 725, 728.

(2) [1911] 2 K. B. 543, 547, 548.

(3) [1913] 3 K. B. 850, 861.

(4) (1890) 7 Times L. R. 49, 50.

(5) (1888) 24 Q. B. D. 445*n*, 448.

BANKES L.J. In my opinion this appeal succeeds. The case seems to me to raise a question of some importance as to the right to obtain discovery by interrogatories. On the day in question the plaintiff after alighting from an omnibus was knocked down and seriously injured by a motor car driven by the defendant's servant. It is stated that, with the possible exception of a person recently discovered who may have witnessed the accident, the plaintiff has failed to discover any witnesses of the accident and that she will have to rely for the details of it on her memory which is faulty and defective owing to the suddenness of the accident and to her having been seriously injured and rendered unconscious. The plaintiff has applied for leave to administer interrogatories the object of which is to ascertain what were the circumstances existing at the time of the accident. Objection is taken to the interrogatories en bloc because of an alleged rule of practice in running-down cases not to allow interrogatories except perhaps in special circumstances. I never heard of such a rule. No doubt in many running-down cases it may be right not to allow interrogatories because they are not "necessary either for disposing fairly of the cause or matter or for saving costs" (Order XXXI., r. 2); as where the plaintiff can call witnesses who saw the accident. But in the present case it cannot be said that the plaintiff has any witnesses whom she can call. One must therefore consider the matter on general principles. I desire to refer to two cases. In *Attorney-General* v. *Gaskill* (1) Cotton L.J. said: "The Judicature Act enables every one as of right to interrogate his opponent, putting by Order XXXI., r. 2, certain checks on the exhibiting useless interrogatories. It enables a person who is called upon to answer interrogatories to defend himself from answering in a way in which he could not have done in former days, but the right to discovery remains the same, that is to say, a party has a right to interrogate with a view to obtaining an admission from his opponent of everything which is material and relevant to the issue raised on the pleadings." The rule there laid down is that discovery by interrogatories is the right of a party when the object is to obtain an admission of something which is material and relevant to the issue raised on the pleadings. The other case to which I will refer is *Hennessy* v. *Wright* (1), where Lord Esher said: "The objection taken by the defendant is, that the answers to the interrogatories in question cannot disclose anything which can be fairly said to be material to enable the plaintiff either to maintain his own case or to destroy the case of his adversary. It must be admitted that, if the answers could be material for either of these purposes, the interrogatories ought to be answered." There are therefore two objects of interrogatories, one to obtain an admission and thus to support the interrogating party's case, and the other to destroy the opponent's case. There are however two well-known limitations upon the right to interrogate. It is not permissible to deliver interrogatories which are of a "fishing" character, or which seek to obtain the names of the opponent's witnesses. The party to an action in a running-down case is subject to the same general rule as to interrogatories as any other party, and his right to interrogate is subject to the same limitations. There cannot be such a rule of practice as suggested not to allow interrogatories in running-down cases, though it may be that in the majority of those cases on the facts interrogatories would not be allowed.

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(1) (1882) 20 Ch. D. 519, 528.

Counsel for the defendant relied on *Marskell* v. *Metropolitan District Ry. Co.* (2) In that case Lord Esher pointed out that the plaintiff knew his position better than any man, and he held therefore that an interrogatory asking the defendants what was the plaintiff's position when the accident happened should not be allowed. That is to say in the circumstances of that case the interrogatory was not "necessary for disposing fairly of the cause or matter." Authorities were also cited to show that the Court of Appeal will not lightly interfere with the exercise of discretion by the judge in chambers. The Court cannot lay down any hard

(1) 24 Q. B. D. 447.

(2) 7 Times L. R. 49.

and fast rule upon that matter; it can only say that it will hesitate to interfere. So far however as the learned judge thought that there was a rule of practice which prevented him from allowing interrogatories in a running-down case and acted upon that supposed rule, in my opinion he was wrong. That he did so act is made clear to my mind by the fact that he gave leave to appeal with the object of obtaining the opinion of this Court upon the question whether any such general rule existed. In my opinion the decision of the learned judge, founded on the supposed rule, was ill-founded, and this Court can properly interfere.

With regard to the particular interrogatories, the first is clearly directed to obtaining an admission which is material and relevant to the issues raised. The fourth is admissible on the same ground. The sixth and seventh ask for relevant admissions and also seek to destroy the defence of contributory negligence.

In my opinion the appeal should be allowed upon the ground that there is no general rule of practice against allowing interrogatories in this case, and on the facts, in the absence of any witnesses for the plaintiff, interrogatories 1, 4, 6 and 7 are necessary for disposing fairly of the action. Leave therefore should be given to deliver these four interrogatories.

SCRUTTON L.J. I agree, but as we are differing from the learned judge I will express my reasons in my own words. The case is an accident case. The plaintiff, who had just alighted from a stationary omnibus, was knocked down and injured by a motor car as she was coming from behind the omnibus. It is stated that no one who saw the accident can be found on behalf of the plaintiff and therefore the plaintiff is the only witness available on her own behalf, and she sustained concussion of the brain, and her recollection will probably prove to be somewhat defective. In these circumstances the plaintiff's advisers desire to interrogate the defendant, and a number of interrogatories are proposed to be administered. The Master took the view that there was a general rule of practice not to allow interrogatories in this class of cases except in special circumstances, and that the fact that the plaintiff had no witnesses was not a special circumstance. The matter therefore started on wrong lines. In my opinion there is no such rule. I personally deprecate any fettering of the procedure necessary for insuring the fair trial of the action beyond that laid down in Order XXXI., r. 2. In most accident cases both parties are able to call witnesses, and therefore to interrogate upon small questions of fact relating to the details of the accident cannot be necessary for the fair trial of the action, and interrogatories should not be allowed. Nor should interrogatories be allowed for "fishing" purposes or to obtain the names of the opponent's witnesses. These considerations are probably sufficient to disentitle the party to interrogate in most accident cases. But there should be no other fetter. Interrogatories are permissible for the purpose of obtaining an admission. Sir George Jessel M.R. in *Attorney-General* v. *Gaskill* (1) said: "The objection taken to the interrogatories as to the right of way is this: It is said that they seek an admission or denial on oath by the defendant on matters in issue between him and the plaintiffs as to which the onus of proof is on the plaintiffs. That is no reason at all. It is because there is the obligation of proof on the plaintiffs that they ask the question." The result is that there is a right to interrogate in order to obtain an admission if the interrogatory is considered necessary for disposing fairly of the action. In the present case the plaintiff, in the absence of witnesses on her behalf who saw the accident, desires to obtain admissions of fact from the defendant as to which she on account of the sudden nature of the occurrence and of the serious injuries which she sustained cannot herself give any satisfactory evidence. The Master, in my opinion, started wrongly in acting on the supposed rule of practice, and the learned judge was also wrong in refusing to allow any of the interrogatories. The learned judge has given leave to appeal, and therefore must be taken as having asked us

(1) 20 Ch. D. 527.

whether he was right in refusing to allow the interrogatories as a whole. I therefore do not feel any difficulty in dealing with the exercise of discretion by the learned judge, if indeed he exercised any discretion.

In my opinion the appeal should be allowed.

ATKIN L.J. I agree with the two judgments which have been delivered, and will only add a few words. I desire to say for myself that I am not acquainted with the rule of practice alleged. I feel strongly that it is wrong to make rigid categories of cases in which interrogatories should or should not be allowed. All cases are now subject to Order XXXI., r. 2. That rule requires the Court to give leave to deliver such interrogatories only as shall be considered necessary either for disposing fairly of the cause or matter or for saving costs. Upon the facts of the present case I agree that the four interrogatories for which leave is now asked are necessary for disposing fairly of the cause.

Appeal allowed.

Solicitor for plaintiff: *Guilford E. Lewis.*
Solicitor for defendant: *F. J. Berryman.*

W. F. B.

1920
Jan. 15.

GEDDLING *v.* MARSH.

Sale of Goods—Implied Condition as to Fitness—Mineral Water in Bottle—Bursting of Bottle—Sale of Goods Act, 1893 (56 *&* 57 *Vict. c.* 71), *s.*14.

Sect. 14 of the Sale of Goods Act, 1893, provides that: "subject to the provisions of this Act . . . . there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows: (1.) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose. . . . ."

The plaintiff retailed mineral waters, the supplies of which she received from the defendant who was a mineral water manufacturer. The plaintiff was charged by the defendant three shillings per dozen for the mineral waters, and one penny in respect of each bottle, the penny being refunded on the bottle being returned, but not otherwise:—

Held, that even if the bottles containing the mineral water were not sold but only hired by the defendant to the plaintiff, they were nevertheless "supplied under a contract of sale" within the above section, and therefore that there was an implied condition that they, as well as their contents, should be reasonably fit for the purpose for which they were required by the plaintiff.

Held therefore that where a bottle so supplied by the defendant to the plaintiff was not reasonably fit, and, in consequence thereof, it burst and injured the plaintiff, she was entitled to recover damages from the defendant.

Appeal from Barrow-in-Furness County Court.

The plaintiff claimed damages for personal injuries caused by the bursting of a bottle of lime juice and soda supplied to her by the defendant. The plaintiff, the wife of a dock labourer, kept a small shop, where she sold, amongst other things, mineral waters. She obtained her supplies of these from the defendant, who was a mineral-water manufacturer. The mineral waters were supplied to her in cases each containing two dozen bottles. She was charged three shillings per dozen for the minerals and a penny in respect of each bottle, the penny being refunded on the bottle being returned, and forfeited if the bottle was broken or for any other reason was not returned. On April 13, 1919, a customer asked the plaintiff for a bottle of ginger beer; the plaintiff said she had only cider and lime juice and soda left, and thereupon she took a bottle of lime juice and soda from a case which the defendant had delivered, and put it on the counter. As the customer did not wish lime juice and soda, the plaintiff took the bottle from the counter, carefully handling it, and was about to replace it in the case when it burst in her hands and seriously injured her. It was found that the plaintiff made known to the defendant the purpose for which she required the bottles of mineral water so as to show that she relied on his skill and judgment; and, further, that the bottles of lime juice and soda were of a description which it was in the course of the defendant's business to supply. The county court judge drew the inference from the facts that the bottle of lime juice and soda in question was not reasonably fit for use by the plaintiff, either through the mixture containing improper ingredients, or the faulty mixture thereof, or the ingredients being unable to withstand changes of temperature, or the bottle not being strong enough or having a defect or flaw, or through a combination of all these causes; and he held that there was an implied condition under s. 14 of the Sale of Goods Act, 1893, that it was reasonably fit for the purpose for which it was required by the plaintiff; that there was a breach of that condition; that it was immaterial whether or not the defect was discoverable by the defendant at the time of the sale to the plaintiff; and that it was also immaterial that the bottle itself, apart from the mixture it contained, was not sold by the defendant to the plaintiff. He accordingly gave judgment for the plaintiff, assessing the damages at 100*l.*

The defendant appealed.

Wingate-Saul K.C. and *Percival Smith* for the defendant. The county court judge does not find which one of the possible causes he mentions actually occasioned the accident. If he had found that the contents of the bottle were not reasonably fit and that the injury to the plaintiff was caused by that unfitness we could not challenge his conclusion; but there was no evidence that the ingredients were in any way improper. Even assuming that it was the bottle that was defective and that the accident was due to that fact, the implied condition as to fitness under s. 14 of the Sale of Goods Act, 1893, does not extend to the bottle as it was not sold but merely bailed to the plaintiff. The section only applies to goods which are the subject of a contract of sale. The county court judge failed to distinguish between the contents of the bottle and the bottle itself.

Claughton Scott for the plaintiff. The contract between the defendant and the plaintiff with regard to the bottles was one, not of bailment but of sale or return. But even assuming that there was no sale of the bottle but merely a bailment, the legal consequence is the same. In *Hyman* v. *Nye* (1) Mathew J. said there appeared to be no distinction in such a case as this between contracts for the sale and for the hire of an article. See also Story on Bailments, 9th ed., s. 390 *a*. Further, and again assuming that the bottle itself was not sold to the plaintiff, it was at all events "supplied under a contract of sale" within s. 14 of the Sale of Goods Act, 1893, and the implied condition as to fitness applies. Mineral waters cannot be reasonably fit for sale unless they are enclosed in a proper container, and a bottle is the usual and proper container for mineral water. To be reasonably fit for the plaintiff to handle the mineral water should have been delivered to her in a proper bottle. It was not so delivered, and the accident having been due to that fact the plaintiff is entitled to recover.

Wingate-Saul K.C. in reply. The conditions implied on a contract of bailment are not the same as those implied on a contract of sale. The defendant was a mere gratuitous lender of the bottle to the plaintiff, and his only obligation was to communicate any defects in it of which he was aware: *Blakemore* v. *Bristol and Exeter Ry. Co.* (2); *Coughlin* v. *Gillison.* (3) In this case the defendant had no knowledge of any defect in the bottle and he is therefore not liable.

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(1) (1881) 6 Q. B. D. 685, 690.

(2) (1858) 8 E. & B. 1035.

(3) [1899] 1 Q. B. 145.

[*Bates* v. *Batey & Co.* (1) and *Longmeid* v. *Holliday* (2) were also referred to.]

BRAY J. In this action the plaintiff claimed damages for injuries caused to her by the bursting of a bottle in which mineral water was supplied to her by the defendant. Her case is based upon a breach of the condition dealt with by s. 14 of the Sale of Goods Act, 1893. The plaintiff kept a small shop in which she sold, among other articles, mineral waters. She was supplied with the mineral water by the defendant in the usual way—namely, in bottles. The bottles were delivered in cases and the course of business was that she was charged threepence for the mineral water in each bottle and one penny in respect of the bottle itself. If the plaintiff returned the bottle she got the penny back; if she did not return it owing to its being lost or broken she did not receive back the penny; and on the county court judge's findings we must take it that there was no sale of the bottles to the plaintiff. The judge found that the accident may have arisen from one or more of a number of causes, one of these being either the improper manufacture of the bottle or some flaw in it. I think we must take it—and it is consistent with the judge's findings—that the accident arose not from any defect in the liquid contained in the particular bottle but from some defect in the bottle itself. As I have said the judge found that there was no sale of the bottle to the plaintiff, but he considered that to be immaterial for this purpose, and the question is, was he right in taking that view?

For the plaintiff it is said that it is immaterial whether in fact the property in the bottle passed to the plaintiff or not, because, whether there was a sale or merely a bailment of the bottle, the case falls within s. 14 of the Sale of Goods Act, 1893. [His Lordship read the section and continued:] In this case there was only one contract—namely, a contract between the plaintiff and the defendant that the plaintiff should be supplied with mineral waters. Mineral waters could not be supplied except in bottles, and therefore the plaintiff was asking to be supplied with mineral waters in bottles. That undoubtedly is a contract of sale, and I will assume that in that contract there might be a condition that the bottles should not be bought by the plaintiff but should be hired; but the question the county court judge had to consider was whether the bottles were not "supplied under a contract of sale." This was a contract of sale none the less because there was a special provision with regard to the bottles. The section, in my opinion, extends not only to the goods actually bought under the contract but to goods "supplied under the contract of sale." This particular bottle was thus "supplied under a contract of sale," and it follows that it should be reasonably fit for the purpose for which it was supplied. In fact it was not reasonably fit and in consequence of that unfitness the plaintiff was injured.

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(1) [1913] 3 K. B. 351.

(2) (1851) 6 Ex. 761.

I desire to add this. Mr. Claughton Scott for the plaintiff contended that in a case like this the obligation of a bailor is exactly the same as that of a vendor. *Hyman* v. *Nye* (1), upon which he relied, does not in my opinion so decide. I am not however deciding this case upon the terms of any contract of hiring; I decide it on the interpretation of s. 14. The appeal must be dismissed.

BAILHACHE J. I am of the same opinion. I think Mr. Wingate-Saul's contention is sound that the condition implied on a contract of bailment is not the same as that implied on a contract of sale. But I think the county court judge decided this case upon the right ground—namely, that the goods in question were goods "supplied under a contract of sale." When a wholesale manufacturer is selling mineral water to a retailer it is, for business purposes, impossible to deliver it except in bottles. Not only the mineral water in the bottles but the bottles themselves must necessarily be

(1) 6 Q. B. D. 685.

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Bailhache J.

supplied under the contract of sale of mineral water as it cannot be supplied except in some sort of container and the common kind of container is a bottle. I think therefore that not only the contents but the bottles were "supplied under a contract of sale" within s. 14, and this notwithstanding that the property in the bottles might not pass under the contract of sale.

The judgment can also be supported upon another ground. The goods are to be reasonably fit for the purpose for which they are required. This particular bottle is found to have been carefully handled and not to have been dropped or knocked against anything. In those circumstances the bottle would not have burst unless there was some effervescence of gas within the bottle itself. Mineral water is not reasonably fit for the purpose for which it is required if it generates gas to such an extent that the bottle containing it bursts. The bottle cannot burst unless the gas is too strong for it. In such a case, even if the provisions of s. 14 are confined to the mineral water, it seems to me that this mineral water was not reasonably fit for the purpose for which it was sold.

Appeal dismissed.

Solicitors for plaintiff: *Janson, Cobb, Pearson & Co., for Wright & Dixey, Lancaster.*

Solicitors for defendant: *Church, Adams, Prior & Balmer, for Cobbett, Wheeler & Cobbett, Manchester.*

J. S. H.

1919
Oct. 27, 28,
29.

In re LAVEY.

Ex parte THE TRUSTEE.

Bankruptcy—Practice—Master and Servant—Agreement of Service entered into by Bankrupt—Order by Registrar that Employers pay Portion of Salary to Trustee—Employers not before Registrar—Refusal by Employers to pay—Subsequent Motion before High Court to which Employers Parties—Declaration and Order by High Court—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 51, *sub-s.* 2—*Bankruptcy Rules,* 1915, *r.* 275.

A bankrupt, after his adjudication, entered into an agreement of service in writing for one year at a salary of 1000*l.*, the agreement being signed in the name of a joint stock company, underneath which was the name of the managing director followed by the words, "managing director." An order was subsequently made by a registrar, under s. 51, sub-s. 2, of the Bankruptcy Act, 1914, that 300*l.* out of a sum of 416*l.* 13*s.* 4*d.* due under the agreement from the company and/or its managing director to the bankrupt be forthwith paid by them to the trustee of the estate of the bankrupt. When the Registrar made that order the only parties before the Court were the trustee and the bankrupt. Neither the company nor its managing director paid the 300*l.*, but alleged that nothing was due to the bankrupt upon the ground that he had broken the agreement by absenting himself from his employment. The trustee then served a notice of motion in the High Court upon the company and its managing director asking for a declaration that he was entitled to the 300*l.* from the respondents as forming part of the property of the bankrupt, and for an order for payment of that amount. The learned judge found that no dismissal had taken place nor had the bankrupt, by his conduct, given notice of his intention not to perform the contract which could be treated by the respondents as an anticipatory breach. No point was taken as to whether the managing director was properly made a respondent:—

Held (while inclining to the view, but without deciding, that there was no remedy against the managing director), that in the circumstances there must be a declaration and order for payment in terms of the notice of motion.

Motion (1.) for a declaration that the applicant as trustee of the estate of the bankrupt Lavey was entitled to the sum of 300*l.* from the respondents as forming part of the property of the bankrupt divisible among his creditors, the said sum being a portion of 416*l.* 13*s.* 4*d.* the amount due to the bankrupt for balance of salary for the year commencing May 24, 1918, and ending May 24, 1919, under a letter of agreement dated May 24, 1918, and made between the bankrupt and the respondents whereby the respondents agreed to pay to the bankrupt a salary of 1000*l.* for one year certain from May 24, 1918.

(2.) For an order that the respondents do pay to the applicant as trustee the said sum of 300*l.*

(3.) An order that the respondents do pay the costs of and occasioned by this motion.

(4.) Such further or other order as to the Court might, n the circumstances, seem fit.

The notice of motion was dated September, 16, 1919.

On March 23, 1917, a receiving order was made against the debtor Lavey, and by an order dated April 25, 1917, he was adjudicated bankrupt.

On April 10, 1919, the bankrupt was examined under s. 25 of the Bankruptcy Act, 1914, and it was then discovered (inter alia) that the following letter of agreement had been entered into with the bankrupt :—

" NEPTUNE TRUST, LIMITED.

ETHELBURGA HOUSE,
91-93, BISHOPSGATE,
LONDON, E.C. 2.
May 24, 1918.

HEREFORD LAVEY, ESQ.
E.C. 2.

Dear Sir,

In reference to the negotiations that have taken place between us and in consideration of the service already rendered by you to us and to be rendered by you in connection with any business that may from time to time be dealt with by you for and on our behalf either jointly or singly, we hereby jointly and severally undertake and agree to pay you

(1.) The sum of 1000*l.* (one thousand pounds sterling) per annum as and from this date, such amount to be payable by equal monthly payments in advance.

(2.) To pay all your expenses including office rent in connection with such business.

(3.) To pay you one-half of all profits accruing to us or either of us from business transacted by you under this agreement, including the Goole and Dundee Docks artificial leather transaction and any other business in hand at this date, such half-share of profits to be paid to you as and when received by us or either of us.

In the event of us, or either of us, finding the necessary money required for carrying through any business to be transacted under this agreement, it is agreed that your share of the profits shall be limited to one quarter of the profits of such business. This agreement is to be in force for one year certain and to be extended thereafter by mutual arrangements, and it is agreed that you are to be at liberty to retain such appointments as are now held by you—viz., J. F. Watson, Liverpool, including your appointment with Mr. R. W. J. Sutherland or his firm, but it is understood that you are to devote such time as is necessary for conducting the business to which this agreement refers.

Yours faithfully,
NEPTUNE TRUST LD.,
E. BROCKDORFF,
Managing Director."

On January 7, 1919, Brockdorff wrote the following letter to the bankrupt :—

"NEPTUNE TRUST, LIMITED.

ETHELBURGA HOUSE,
91-93, BISHOPSGATE,
E.C. 2.
January 7, 1919.

Dear Mr. Lavey,

Referring to the appointment which I gave you and which was to hold good as a trial for one year, I should like to give you notice in plenty of time terminating same.

Yours sincerely,
E. BROCKDORFF."

The Neptune Trust, Ld., paid the bankrupt seven monthly cheques of 83*l.* 6*s.* 8*d.* each, making a total of

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LAVEY, *In re.* THE TRUSTEE, *Ex parte.*

583*l.* 6*s.* 8*d.*, and the trustee claimed that there was payable to the bankrupt in respect of his salary of 1000*l.* the sum of 416*l.* 13*s.* 4*d.*

On August 28, 1919, an order was made by a registrar under s. 51, sub-s. 2, of the Bankruptcy Act, 1914 (1), that 300*l.* out of the sum of 416*l.* 13*s.* 4*d.* due from Eric Brockdorff and/or the Neptune Trust, Ld., to the bankrupt be forthwith paid to the applicant as trustee by Eric Brockdorff and/or the Neptune Trust, Ld.

When the Registrar made that order the only parties before the Court were the trustee and the bankrupt.

Application was made on August 28, 1919, by the trustee's solicitors to the respondents for a remittance of the 300*l.* payable under the order and in reply thereto the solicitors received the following letter :—

"ETHELBURGA HOUSE,
91-93, BISHOPSGATE,
LONDON, E.C. 2.
August 30, 1919.

Dear Sirs,

Re Sidney Hereford Lavey in Bankruptcy.

We are in receipt of your favour of 28th inst. but cannot agree to your suggestion that there is any money due to the above, Mr. Lavey having himself broken the Agreement by not putting in an appearance at the office.

Yours faithfully,
NEPTUNE TRUST, LD.
E. BROCKDORFF,
Managing Director."

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(1) Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 51, sub-s. 2: "Where a bankrupt is in receipt of a salary . . . . the Court, on the application of the trustee, shall from time to time make such order as it thinks just for the payment of the salary . . . , or of any part thereof, to the trustee, to be applied by him in such manner as the Court may direct."

Bankruptcy Rules, 1915, r. 275: "Where an order has been made for the payment by a bankrupt, or by his employer for the time being, of a portion of his income or salary, the bankrupt may, upon his ceasing to receive a salary or income of the amount he received when the order was made, apply to the Court to rescind the order, or to reduce the amount ordered to be paid by him to the trustee."

Sealed copies of the order were, on September 1, 1919, served upon the respondents respectively. The 300*l.* not having been paid the notice of motion of September 16, 1919, was served on the respondents. At the hearing no point was made as to whether Brockdorff was properly made a respondent. There was a conflict of evidence between the bankrupt and Mr. Newton, the secretary of the Neptune Trust, Ld., but the learned judge accepted the bankrupt's evidence which (so far as material) was that on three occasions, once in February, 1919, he went to the office and that he there had a conversation with Newton and that at that conversation Newton did not repudiate the liability, but said that things were going very badly at that time and that when he was asked by the bankrupt for his salary he told the bankrupt that it was difficult to get cheques signed by anybody. The bankrupt called again in March and only saw a girl there who said that both Brockdorff and Newton were out. He went again in April when he saw Newton and asked him for his money, and Newton made the excuse that there was very little money there.

Mr. Brockdorff, in the course of his evidence, said that he "lay low" because he was anxious to get rid of the bankrupt.

Clayton K.C. and *Hansell* for the applicant.

Schwabe K.C. and *Palmer* for the respondents.

The points taken during the arguments sufficiently appear from the judgment: Smith's Master and Servant, 5th ed., p. 159, was referred to.

HORRIDGE J. This is an application by the trustee against the Neptune Trust, Ld., and Mr. Brockdorff, for payment by them of moneys which the trustee alleges were due to the bankrupt under an agreement dated May 24, 1918.

No distinction has been taken before me as to whether Mr. Brockdorff is properly made a respondent or not. The case has been treated as if he was a party to the agreement. I incline to the view that as the agreement is in writing and

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as he is described as managing director, there is no remedy against him; the remedy is against the Neptune Trust, Ld. I understand however that Mr. Schwabe makes no point as to that.

The claim under this agreement seems to me to depend upon whether or not the bankrupt Lavey had given notice to the other side; I do not mean specific notice in writing or anything of that kind; but had given notice by his conduct that he did not intend on his part to perform the agreement. An agreement of this kind may be ended in two ways. It may be ended, as Mr. Clayton says, by dismissal, and the employer has to justify the dismissal, or pay damages. That is not the case here. He asks me to say that in the event of there being no dismissal the agreement could not come to an end. I do not agree. This is like any other agreement. It can be terminated by notice on one side of intention not to perform the agreement; but that notice must be accepted by the other side as an anticipatory breach. There is a long series of decisions (*Johnstone* v. *Milling* (1); *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (2)), and a number of others which lay down that well recognized principle.

The question I have to decide is, Did Lavey give notice to the Neptune Trust, Ld., that he was not going to perform his portion of the agreement? For the purpose of arriving at a decision on that point I have to make up my mind whom I believe.

[The learned judge then shortly reviewed the evidence given by the bankrupt and Mr. Brockdorff, between whom he found there was no conflict, and continued :]

The letter of January 7, 1919, clearly recognizes the existing agreement and says that it is not going to be continued for another year.

The next question which I have to ask myself is, Do I prefer the evidence of Mr. Lavey or the evidence of the secretary, Mr. Newton? I prefer Mr. Lavey's evidence.

In these circumstances I cannot say that the bankrupt gave any such notice to the respondents as would entitle

(1) (1886) 16 Q. B. D. 460.

(2) (1884) 9 App. Cas. 434.

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them to accept his notice as being a repudiation of the contract. Mr. Brockdorff quite candidly does not pretend he ever actually accepted it; but he says that he "lay low" because he was only too anxious to get rid of the bankrupt. I have no doubt that he would have accepted it if it had come to a formal repudiation.

For these reasons I think that the trustee's motion succeeds and that there must be a declaration in the terms of the notice of motion and an order upon the respondents to pay the 300*l.* claimed with costs.

Declaration and order accordingly.

Solicitors for applicant: *Cohen & Cohen.*
Solicitors for respondents: *Roney & Co.*

J. E. A.

1919
Nov. 21.

WHITEHALL COURT, LIMITED *v.* ETTLINGER.

[1918. W. 26.]

Landlord and Tenant—Lease of Flat—Requisition by Government—Eviction by Title Paramount—Liability of Tenant for Rent.

Two flats in a block of buildings were let to a tenant under two leases for a term of three years from June 24, 1915, the tenant covenanting to pay the rent reserved by the leases. In May, 1917, the competent military authorities acting under the powers conferred by the Defence of the Realm Regulations served a notice upon the tenant requisitioning the flats and requiring immediate possession, and the tenant thereupon vacated the two flats. He paid to the landlords the rent due in respect of the two flats up to the time when the military authorities took possession of the flats but refused to pay the rent due subsequent to that date. The military authorities were still in occupation of the flats when the two leases expired on June 24, 1918. The landlords brought an action against the tenant for rent due under the two leases in respect of the flats after the military authorities took possession of the flats:—

Held, that the tenant had not been evicted by title paramount so as to suspend the tenancy, and also that the tenancy had not been determined by the requisitioning of the flats, the doctrine of the termination of a contract by reason of the frustration of the adventure not applying to the case of a contract which created an estate by demise, and that therefore the landlords were entitled to recover the rent from the tenant.

TRIAL of action before Earl of Reading C.J. without a jury.

The plaintiffs were the owners of a block of buildings known as Whitehall Court, which were let out in flats, two of them being let to a Mr. Karl Ettlinger under two leases dated respectively June 3 and November 21, 1915, each of them for a term of three years from June 24, 1915, at the rents of 475*l.* and 200*l.* per annum respectively, the tenant covenanting to pay the rents reserved by the leases.

Each of the leases contained a clause (No. 16) that the landlords would supply and the tenant would purchase from them only all food, wines, spirits and all other consumable and domestic stores and fuel which the tenant might require for use upon the premises at the current tariff price from time to time in force at Whitehall Court.

In December, 1916, the competent military authorities, acting under the Defence of the Realm Regulations, served a notice upon the tenant stating that the War Department required immediate possession of his flats. The tenant objected to give up possession. On May 17, 1917, the tenant was informed by His Majesty's Office of Works that the requisitioning of his flats by the military authorities, notice of which had been given on December 14, 1916, must take immediate effect, and that possession would be required by Saturday night, May 19. The tenant accordingly vacated the flats and went to an hotel, the furniture being removed from the flats by H.M.'s Office of Works. He refused to occupy a flat which it was suggested that he should occupy in substitution for the two flats.

The tenant was informed by H.M.'s Office of Works that the commandeering of his flats did not terminate his personal liability to the landlords, and that he must make a formal claim for compensation upon the proper form to the Defence of the Realm Losses Commission, and that until such claim had been duly completed and submitted to the Commission the Office of Works could not assume the responsibility for the rent of the flats; but that if the claim was duly made the Board would recommend to the Defence of the Realm Losses Commission that he should be indemnified against

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the obligations under his agreement during the period of the Government occupation. The tenant however refused to make any claim to the Commission, contending that he was not liable for the payment of rent in respect of the two flats under the two leases after the Government took possession. The plaintiffs, as landlords, also refused to make any claim to the Commission, and relied upon their right against the tenant for payment of the rent in respect of the two flats under the terms of the two leases.

The tenant paid the rent for the two flats to the plaintiffs up to May 19, 1917, when the military authorities took possession of the flats but declined to pay rent subsequent to that date.

The military authorities were still in occupation of the two flats when the two leases expired on June 24, 1918.

The plaintiffs sued the tenant to recover 405*l*. 19*s*. 6*d*., the balance of the rent due in respect of the two flats to December 25, 1917. While the action was pending the tenant died, and the action was continued against his executrix.

Holman Gregory K.C. and *G. W. Ricketts* for the plaintiffs. The liability of the tenant to the landlords to pay the rent reserved in the leases was not terminated by the requisitioning of the flats. This question was debated in *Harrison* v. *Lord North* (1), but apparently not decided: see Platt on Leases, vol. ii., p. 122. The leases were not extinguished, nor was the tenant's title to the premises put an end to, although his personal enjoyment of the premises became impossible: *London and Northern Estates Co.* v. *Schlesinger*. (2) Lush J. in that case pointed out that it was not correct to speak of the tenancy agreement as a contract and nothing more; a term of years was created by it and vested in the appellant, and there was no reason for saying that because he was personally disqualified from residing in the flat that the chattel interest which was vested in him by virtue of the agreement was thereby affected. The fact that the tenant has lost the use of the premises demised to him, not by the

(1) (1667) 1 Ch. Ca. 83.

(2) [1916] 1 K. B. 20.

act of the landlord but by fire or other inevitable accident, affords no answer to a claim for rent becoming subsequently due: see Foà on Landlord and Tenant, 5th ed., p. 170. These leases amounted to the demise of a chattel real, an estate being thereby created; it is not a commercial contract, and therefore the doctrine of the frustration of the adventure is not applicable.

Giveen for the defendant. The tenant left the flats in consequence of the order of the Government, and he was kept out of possession during the remainder of the tenancy. This case comes within the old rule that eviction by a person with title paramount affords a good defence to an action for rent: see Foà on Landlord and Tenant, 5th ed., p. 167. In the case of eviction by a person with title paramount the tenancy is suspended. A common instance of eviction by title paramount is where demised premises are taken by a public company under the authority of an Act of Parliament. The law is thus stated in Gilbert on Rents, p. 145, the passage being taken from Bacon's Abridgement, vol. vii., p. 58: "If, therefore, the tenant be deprived of the thing letten, the obligation to pay the rent ceases, because such obligation had its force only from the consideration, which was the enjoyment of the thing demised. From hence then we may gather these conclusions or inferences. First, that if the lands demised be evicted from the tenant, or recovered by a title paramount, the lessee is discharged from the payment of the rent from the time of such eviction: but, notwithstanding such recovery or eviction, the tenant shall pay the rent that became due before the recovery: because the enjoyment of the land being the consideration for which the tenant was obliged to pay the rent, so long as the consideration continued, the obligation must be in force; there being the same reason that the tenant should pay the rent, for part of the time contracted for, as for the whole term, if he had enjoyed the land so long." There is no difference between occupation and possession for this purpose. The only thing that is necessary is that the tenant should have quitted the premises against his will.

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Secondly, having regard to all the circumstances, the short term created by the lease, and the other advantages secured to the tenant by clause 16 of the lease, the whole tenancy was put an end to by the requisitioning of the premises. When the military authorities took possession of the premises every use of the premises by the tenant was thereby rendered impossible. In *London and Northern Estates Co.* v. *Schlesinger* (1), as Avory J. pointed out, there was nothing in the order to prevent the tenant from lending the flat to any of his friends, he was merely prevented from personally residing there. The doctrine of the termination of a contract owing to the frustration of the adventure, as laid down in *Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (2), is not confined to the case of a charterparty. The doctrine was applied in *Metropolitan Water Board* v. *Dick, Kerr & Co.* (3) to a contract to construct a reservoir, which was held to be dissolved by a complete change of circumstances: see the judgment of Lord Parmoor. McCardie J. in *Blackburn Bobbin Co.* v. *T. W. Allen & Sons* (4) stated that a contract was dissolved where Government intervention had removed the specific subject-matter of the contract from the scope of private obligation, and cited *In re Shipton, Anderson & Co. and Harrison Brothers & Co.* (5) as an example. That dictum directly applies to the present case, the substratum of the contract for the tenancy of the flats having been destroyed by their occupation by the military authorities.

Holman Gregory K.C. in reply. The doctrine of eviction by title paramount does not apply here because the tenant was not evicted but went out of possession on receiving the notice. The doctrine of frustration of a commercial adventure does not apply to a contract which creates an estate by demise.

EARL OF READING C.J. The question to be determined in this case is whether or not the plaintiffs are entitled to recover the rent due under the leases by virtue of the covenant to pay rent therein contained into which the tenant had entered with the plaintiffs. I have come to the conclusion that there is nothing in the facts and circumstances of this case which would justify me in saying that the tenancy created by the leases had been thereby determined. If I were dealing with a commercial contract, or an agreement between the parties which did not also amount to a demise of premises as in this case, there would be great force in the arguments which were put before me. It was said in the first place that this is a case of eviction by title paramount, and if it were so Mr. Giveen would have made good the first proposition upon which he rested his case. But I am not satisfied that this was an eviction at law. When the tenant moved away from the flats he did so by force of circumstances—that is, by the order of the Government authorities. I do not think however that it could be said that he was evicted by title paramount. In the circumstances there was no eviction of him by the Government and no determination of the estate created by the leases. The tenant, for all he knew, might have been able to return to the flats after a short absence, on the other hand he might have to remain away a long time as in the present case, even until the end of the term. I am however not satisfied that this case is brought within the principle to which reference has been made—namely, that this is an eviction by law—that is, by title paramount. If it were I should have to hold that the act of the Government in calling upon the tenant to give up occupation of these premises to the War Office operated as a determination of the estate created by the leases. There is nothing in the notice which was served upon the tenant to show that the Government required more than the occupation of the premises for an undefined period. Notice was first given to the tenant in December, 1916, that the premises had been requisitioned and that possession would be required by a certain time, and asking him to make arrangements to move from the flats. This appears to be the way in which matters were left right up to the end of the term in June, 1918. Nothing further seems to have been done. It is true, as Mr. Giveen contends, that there was a requisition of premises for the time being, but that is all the notice amounts to. I cannot read it as amounting to an eviction in law of the tenant. Reference was made by Mr. Giveen to a passage in Bacon's Abridgement, vol. vii., p. 58, which was taken from Rolle's Abridgment, and afterwards repeated in Gilbert on Rents, p. 145, where the law is laid down as follows: "That if the lands demised be evicted from the tenant, or recovered by a title paramount, the lessee is discharged from the payment of the rent from the time of such eviction: but, notwithstanding such recovery or eviction, the tenant shall pay the rent that became due before the recovery: because the enjoyment of the land being the consideration for which the tenant was obliged to pay the rent, so long as the consideration continued, the obligation must be in force; there being the same reason that the tenant should pay the rent, for part of the time contracted for, as for the whole term, if he had enjoyed the land so long." The same observation that I have already made would also apply to this statement of the law. The whole question is whether there has been an eviction by title paramount. The first point therefore fails.

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(1) [1916] 1 K. B. 23.

(2) [1916] 2 A. C. 397.

(3) [1918] A. C. 119, 140.

(4) [1918] 1 K. B. 540, 547.

(5) [1915] 3 K. B. 676.

The second point taken by Mr. Giveen was that there had been a determination of the whole tenancy by reason of the requisition of the flats. It seems to me that that depends upon much the same considerations. It is said that, looking at all the circumstances, treating the case as one would an ordinary contract, and applying the general principles which are not in dispute, I ought to hold the whole tenancy to be at an end. But I find the same difficulty with regard to this point as I did with regard to the first point. The judgment of Lush J. in *London and Northern Estates Co.* v. *Schlesinger* (1) has been cited, where he said: "It is not correct to speak of this tenancy agreement as a contract and nothing more. A term of years was created by it and vested in the appellant, and I can see no reason for saying that because this Order disqualified him from

(1) [1916] 1 K. B. 20, 24.

personally residing in the flat it affected the chattel interest which was vested in him by virtue of the agreement." I think that dictum applies to the present case. I can see no reason why the chattel interest which was vested in the tenant by virtue of the two leases was affected merely because he was personally prevented from residing in the flats. If I were dealing with an ordinary contract I should feel great force in the argument addressed to me by Mr. Giveen, but I can find no authority and no justification for saying that I must apply to the present case the principles laid down in the citations made by Mr. Giveen. The agreements contained in the leases are not only contracts, they also create an estate by demise for a term of years. Therefore I think that the plaintiffs are entitled to recover their rent. This decision still leaves the tenant free to claim from the Defence of the Realm Losses Commission for an indemnity in respect of his payment of rent. He has not been able to enjoy the occupation of the premises as he thought to do when he entered into the tenancy, nevertheless he has agreed to pay rent, and I cannot find sufficient ground for saying that he is excused from paying rent, and therefore I must give judgment for the plaintiffs with costs.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Benham, Barrett, Synnott & Wade.*
Solicitors for defendant: *Stanley, Woodhouse & Hedderwick.*

R. F. S.

1919
Dec. 1.

[IN THE COURT OF CRIMINAL APPEAL.]

THE KING *v.* WAKELEY.

Criminal Law—Carnal Knowledge of Girl between 13 *and* 16*—Limit of Time for Prosecution—Commencement of Prosecution—Amendment of Information—Criminal Law Amendment Act,* 1885 (48 *&* 49 *Vict. c.* 69), *s.* 5*—Prevention of Cruelty to Children Act,* 1904 (4 *Edw.* 7, *c.* 15), *s.* 27.

By s. 5 of the Criminal Law Amendment Act, 1885, as amended by s. 27 of the Prevention of Cruelty to Children Act, 1904, a prosecution for the offence of unlawfully having carnal knowledge of a girl between thirteen and sixteen years of age must be commenced within six months after the commission of the offence.

The appellant was charged with having had carnal knowledge of a girl between thirteen and sixteen years of age. The information, which was sworn on May 3, 1919, charged the offence as having been committed between November 6 and 7, 1918. Subsequently, on May 13, 1919, the information was amended, the date when the offence was alleged to have been committed being altered to between November 3 and 8, 1918. The girl gave evidence at the trial that the appellant had connection with her on November 4, 1918. The appellant, who was convicted, appealed against his conviction on the ground that the proceedings were out of time, having been commenced on May 13, when the information was amended, which date was more than six months after November 4, the date of the commission of the offence:—

Held, that the amendment of the information on May 13, 1919, was not the commencement of the prosecution, which took place on May 3, when the information was originally laid, as the amendment did not charge a different offence from that charged in the information as originally laid, and that as the dates inserted in the amended information as the dates within which the offence had been committed were all within six months of May 3, when the information was laid, the prosecution was not out of time.

APPEAL against conviction.

The appellant was tried at the Exeter assizes upon a charge of having had carnal knowledge of a girl between thirteen and sixteen years of age.

The information, which was sworn on May 3, 1919, alleged that the offence was committed between November 6 and 7, 1918. The information was amended on or about May 13, the date when the offence was alleged to have been committed being altered in the information from between November 6 and 7, 1918, to between November 3 and 8, 1918.

The girl gave evidence at the trial that the appellant had connection with her on November 4, 1918. This however was denied by the appellant.

The judge in summing up the case to the jury said that he could not see any corroboration of the girl's story, and that it was not proper to convict a man on evidence of that kind without corroboration. The jury nevertheless returned a verdict of guilty, and the appellant was sentenced to twelve months' imprisonment with hard labour.

Geen for the appellant. Under s. 5 of the Criminal Law Amendment Act, 1885, as amended by s. 27 of the Prevention of Cruelty to Children Act, 1904 (1), a prosecution for the offence of unlawfully having carnal knowledge of a girl between thirteen and sixteen years of age must be commenced within six months after the commission of the offence. The information, which was originally laid on May 3, 1919, and charged an offence on November 6 or 7, 1918, was in order ; but when that information was amended on May 13 that amended information was substituted for the information sworn on May 3, and the substituted information became the commencement of the prosecution. That amended information was out of time inasmuch as May 3, 1919, was the last day on which a prosecution could be commenced for an offence committed on November 4, 1918. The prosecution therefore was commenced more than six months after the commission of the alleged offence on November 4, 1918. No information or amended information after May 3, 1919, should be allowed to take away the appellant's rights under the statutory limitation of time : see *Weldon* v. *Neal.* (2)

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(1) By s. 5 of the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69): "Any person who (1.) unlawfully and carnally knows or attempts to have unlawful carnal knowledge of any girl being of or above the age of thirteen years and under the age of sixteen years . . . . shall be guilty of a misdemeanour. . . . Provided, also, that no prosecution shall be commenced for an offence under sub-s. 1 of this section more than three months after the commission of the offence."

By s. 27 of the Prevention of Cruelty to Children Act, 1904 (4 Edw. 7, c. 15): "The limit of time mentioned in the second proviso of s. 5 of the Criminal Law Amendment Act, 1885, shall be six months after the commission of the offence."

(2) (1887) 19 Q. B. D. 394.

The conviction of the appellant, having regard to all the circumstances and the absence of corroboration, was not safe as not being reasonable, and ought to be quashed: *Rex* v. *Baskerville*. (1)

W. T. Lawrance for the Crown was not called upon.

The judgment of the Court (Earl of Reading C.J., Sankey and Salter JJ.) was delivered by

EARL OF READING C.J. This appeal is based upon two grounds. The offence of which the appellant was convicted was committed on November 4, 1918, and the proceedings against the appellant were started on May 3, 1919, when the information was laid—that is, one day less than six months after the commission of the offence. It is said however that the information originally alleged that the offence was committed between November 6 and 7, but the police discovered that these dates could not be established by the evidence, and they therefore threw the net wider and alleged the offence to have been committed between November 3 and 8, and amended the information accordingly. If the offence had been charged in the information when it was originally laid as having been committed between November 3 and 8, 1918, the objection could not have been taken that the prosecution was barred through not having been commenced within six months from the commission of the offence. But it was contended by Mr. Geen that we must regard the prosecution as having been started not earlier than May 13, the day on which the information was amended, and that if the prosecution was commenced on May 13 it was commenced too late, more than six months having elapsed from November 4, 1918, when the offence was committed, and that therefore the information ought to be quashed. We are however of opinion that there is no substance in the point, and that it fails, inasmuch as the offence is charged in the information as having been committed within six months from the commencement of the proceedings on May 3. If the case for the appellant had been that the prosecution, having started proceedings on May 3 by alleging that the offence was committed on a date within the six months, had then amended the information by alleging the offence to have been committed on a date more than six months from May 3, there would have been great force in the argument. What was done by the alteration was only the same as if the information had laid the offence as having been committed on November 6 or 7, and then subsequently, in order to fix the limits of time within which the offence was committed, had alleged the offence as having been committed between November 4 and 8. We are of opinion that the amended information did not charge a different offence to that which was charged in the information as originally laid. The amendment was made merely for the purpose of extending the dates within which the offence was alleged to have been committed, and the dates inserted in the amended information all fell within the period of six months from May 3, 1919. The amendment of the information on May 13 cannot be said to have been the initiation of the proceedings. To put the case that was suggested during the argument by Sankey J.: Suppose the Court had exercised its power of amendment during the course of the trial, and had altered the dates when the offence was alleged to have been committed in the same way as they were altered in the information it would be impossible to say that this was the initiation of the proceedings; it would be only a step taken during the proceedings. The case of *Weldon* v. *Neal* (1) carries us no further. That is really an instance of what would have happened if it had been sought to alter the information by alleging the offence as having been committed on a date outside the six months from May 3, but that is not this case. There is therefore in our opinion no substance in the first objection taken on behalf of the appellant, and it fails.

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(1) [1916] 2 K. B. 658, 663.

It was next said on behalf of the appellant that the case was so unsatisfactory that it was not safe to convict, and reliance was placed upon the summing up of the judge at

(1) 19 Q. B. D. 394.

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the trial. It is clear that if the case had been left to him to decide he would have acquitted the appellant. But the verdict is the verdict of the jury, who are alone responsible for it, and the jury, after hearing the direction of the judge as to the law, convicted the appellant notwithstanding that the judge was of opinion that he ought to be acquitted. This Court is unable to say, having regard to the circumstances of the case, that the verdict is so unreasonable that it cannot stand. The fact that the jury disregarded the warning of the judge is not sufficient ground for setting the verdict aside; the verdict must be an unreasonable one in order that that result should follow. The jury heard the witnesses, and they were in the best position to arrive at a proper conclusion. We cannot say that the verdict was unreasonable, and therefore it must stand.

Appeal dismissed.

Solicitor for appellant: *Registrar of Court of Criminal Appeal.*

Solicitor for Crown: *Director of Public Prosecutions.*

R. F. S.

MELACHRINO AND ANOTHER *v.* NICKOLL AND KNIGHT.

1919
Dec. 1, 2, 10.

Sale of Goods—Contract to deliver at fixed Time—Time fixed by Reference to Arrival of Ship—Anticipatory Breach—Measure of Damages—Sale of Goods Act, 1893 (56 *&* 57 *Vict. c.* 71), *s.* 51, *sub-s.* 3.

By s. 51, sub-s. 3, of the Sale of Goods Act, 1893, "Where there is an available market for the goods . . . . the measure of damages"—for non-delivery—"is prima facie to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver":—

Held, that where the time for delivery is fixed by reference to the happening of an event, it is fixed within the meaning of the section.

Where there is an anticipatory breach by a seller of a contract to deliver at a fixed date goods for which there is a market, the true rule as to the measure of damages is that the buyer, without buying against the seller, may bring his action at once, but if he does so his damages must be assessed with reference to the market price of the goods at the time when they ought to have been delivered under the contract. If the action comes on for trial before the contractual date for delivery has arrived, the Court must arrive at that price as best it can. To this rule there is one exception for the benefit of the defaulting seller—namely, that if he can show that the buyer acted unreasonably in not buying against him, the date to be taken is the date at which the buyer ought to have gone into the market to mitigate damages.

AWARD in the form of a special case stated for the opinion of the Court (pursuant to s. 7, sub-s. (*b*), of the Arbitration Act, 1889) by a Board of Appeal of the Committee of Appeal of the Incorporated Oil Seed Association.

Messrs. Melachrino and Kaniskeri, as sellers, made two contracts with Messrs. Nickoll and Knight, as buyers, each dated November 24, 1916, and precisely similar in terms except as to price.

The form of the contracts used was the printed form of contract issued by the Incorporated Oil Seed Association for adoption by persons engaged in the oil-seed trade in sales of cargoes of Egyptian cotton seed with slight variations adopted by the parties. Each contract was for the sale of half a cargo of Egyptian cotton seed per steamship *Asaos,* to be shipped by the above steamship from Alexandria expected ready to load during December 1916. Payment to be made in London fourteen days from the seed being ready for delivery in exchange for shipping documents and for delivery order. By clause 11 of the contracts it was provided that in default of fulfilment of contracts by either party the other party should after giving notice in writing have the right of resale or repurchase as the case might be and the defaulters should make good the loss if any on demand and that in the event of the right of resale or repurchase not being exercised the damages if any for which the party in default might be liable should be settled by arbitration. On December 14, 1916, the sellers repudiated the contracts and wrongfully refused to deliver the cotton seed. On the same day the buyers accepted the repudiation and there was thus an anticipatory breach.

The arbitrators found that an average voyage from Alexandria to the United Kingdom was at the time about three or four weeks; that the seed might have been expected to be delivered at any time between January 10 and February 10, 1917; that the market price was above the contract price on December 14, 1916; that it began to fall on December 18, and was below the contract price during the whole of the period between January 10 and February 10, 1917. The buyers did not give notice in writing under clause 11 to repurchase and did not buy against the sellers but in accepting repudiation on December 14, 1916, claimed arbitration.

The sellers contended before the arbitrators that inasmuch as the buyers did not buy against the contracts, the proper time for assessing the measure of damages was the time at which the cotton seed ought to have been delivered.

The buyers contended that the measure of damages should be assessed at the time the sellers wrongfully refused to deliver the cotton seed, namely, on December 14, 1916.

In view of their finding that the cotton seed might have been delivered at any time from about January 10, 1917, to about February 10, 1917, the arbitrators were of opinion that no precise time was or could be fixed for delivery, and that the measure of damages should therefore be ascertained by the difference between the contract price and the market price at the time of the refusal to deliver. But in order to raise the question of law as to the proper time at which the damage should be assessed they stated this case for the opinion of the Court.

If the Court should be of opinion that the measure of damages should be assessed at the time at which delivery of the cotton seed might reasonably have been expected they awarded that the buyers were not entitled to recover any damages from the sellers other than nominal damages which they assessed at one shilling.

If the Court should be of opinion that the measure of damages should be assessed at the time at which the sellers wrongfully refused to deliver the cotton seed—namely, on December 14, 1916—they awarded that the sellers should each pay as damages to the buyers 1562*l.* 10*s.*

The question for the opinion of the Court was whether the true measure of damages was (as the arbitrators held) the difference between the contract price and the market price on December 14, the date of the refusal to deliver, or the difference at the time at which the cotton seed ought to have been delivered.

Leck K.C. and *Claughton Scott* for the sellers.

Neilson K.C. and *Sir R. Aske* for the buyers.

The points discussed during the arguments sufficiently appear from the judgment.

[The following authorities were referred to: *Brown* v. *Muller* (1); *Nickoll & Knight* v. *Ashton & Co.* (2); *Tredegar Iron and Coal Co.* v. *Hawthorn Brothers & Co.* (3); *Frost* v. *Knight* (4); *Roper* v. *Johnson* (5); *Williams Brothers* v. *Agius* (6); *Ashmore & Son* v. *Cox & Co.* (7); Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 51.

Cur. adv. vult.

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(1) (1872) L. R. 7 Ex. 319.

(2) [1900] 2 Q. B. 298; [1901] 2 K. B. 126.

(3) (1902) 18 Times L. R. 716.

(4) (1872) L. R. 7 Ex. 111.

(5) (1873) L. R. 8 C. P. 167.

(6) [1914] A. C. 510.

(7) [1899] 1 Q. B. 436.

Dec. 10. The following judgment was read by BAILHACHE J. (who, after stating the facts, continued:) Upon these facts the question arises: Are the buyers' damages to be fixed with reference to the market prices on December 14, 1916, or with reference to the prices ruling at the time when the goods might be expected to be delivered? If the former the damages are substantial, if the latter nominal. The arbitrators have assessed the damages as at the date of the anticipatory breach.

There was a market for the goods and in that case the prima facie rules for the measurement of damages as laid down in s. 51 of the Sale of Goods Act, 1893, vary according to whether there is a fixed time for delivery or not. If there is no fixed time the measure is the difference between the contract price and the market price at the time of refusal to deliver. The first point to determine therefore is whether this was a contract of that kind. In my opinion it was not. The time was not certain but it was fixed by reference to the happening of an event—namely, the arrival of the *Asaos* in the United Kingdom. I take it that when s. 51 speaks of no time being fixed for delivery it refers to those contracts in which no mention of time is made and which therefore are to be performed within the indefinite period known as a reasonable time under the circumstances.

In regard to other cases of which this is one the prima facie measure of damages is said to be the difference between the contract price and the market price at the time the goods ought to have been delivered—in this case the period between January 10 and February 10, 1917. In a constantly fluctuating market and if the prices during that period had ruled higher than the contract prices there might have been some difficulty in determining the proper price to be taken, but in this case that point does not arise, as at all times between those dates the market prices were below the contract prices.

Sect. 51 does not in terms deal with an anticipatory breach, and in the case of a breach by effluxion of time it is clear that it makes no difference to the measure of damages whether a buyer goes into the market or is content to take the difference in price without troubling to buy against the defaulting seller. The question to be decided is whether the same rule applies in the case of an anticipatory breach.

An anticipatory breach occurs when the seller refuses to deliver before the contractual time for delivery has arrived and the buyer accepts his refusal as a breach of contract.

In that case the following rules are well established, subject of course to any express provisions to the contrary in any particular contract.

Immediately upon the anticipatory breach the buyer may bring his action whether he buys against the seller or not.

It is the duty of the buyer to go into the market and buy against the defaulting seller if a reasonable opportunity offers. This is expressed by the phrase "It is the buyer's duty to mitigate damages." In that event the damages are assessed with reference to the market price on the date of the repurchase. If the buyer does not perform his duty in this respect the seller is none the less entitled to have damages assessed as at the date when a fresh contract might and ought to have been made.

As a corollary to this rule the buyer may if he pleases go into the market and buy against the seller: as he is bound to do so to mitigate damages, so he is entitled to do so to cover himself against his commitments or to secure the goods. In that case again the damages are assessed with reference to the market price at the date of the repurchase.

It is also settled law that when default is made by the seller by refusal to deliver within the contract time the buyer is under no duty to accept the repudiation and buy against him but may claim the difference between the contract price and the market price at the date when under the contract the goods should have been delivered.

Further, in the case of an anticipatory breach the contract is at an end and the defaulting seller cannot take advantage of any subsequent circumstances which would have afforded him a justification for non-performance of his contract had his repudiation not been accepted.

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Bailhache J.

In logical strictness it would appear to follow that equally the defaulting seller cannot take advantage of a fall in the market before the due date for delivery to escape liability for damages.

It looks therefore at first sight as though the date at which the difference between the contract price and the market price ought to be taken for the assessment of damages when the buyer does not buy against the seller should follow by analogy the rule adopted where the buyer goes into the market and buys, or where the breach is failure to deliver at the due date and should be at or about the date when the buyer intimates his acceptance of the repudiation though he does not actually go into the market against the seller. If so, in this case, the date would be about December 14, when the buyer claimed arbitration and so the arbitrators have found.

As against this line of reasoning it must be remembered that the object of damages is to place a person whose contract is broken in as nearly as possible the same position as if it had been performed. This result is secured by measuring damages either at the date of the repurchase, in the case of repurchase on an anticipatory breach, or at the date when the goods ought to have been delivered when there is no anticipatory breach whether there is a repurchase or not. In these cases the buyer gets a new contract as nearly as may be like the broken contract and the defaulting seller pays the extra expense incurred by the buyer in restoring his position.

Where however there is an anticipatory breach but no buying against the defaulting seller, and the price falls below the contract price between the date of the anticipatory breach and the date when the goods ought to have been delivered, the adoption of the date of the anticipatory breach as the date at which the market price ought to be taken would put the buyer in a better position than if his contract had been duly performed. He would if that date were adopted be given a profit and retain his money wherewith to buy the goods if so minded on the fall of the market. It would be in effect, to use a homely phrase, to allow him to eat his cake and have it. Perhaps it is better to avoid figures of speech however picturesque and to say, to make a profit from the anticipatory breach while the contract if duly performed would have shown a loss—a position which is I think irreconcilable with the principles upon which damages are awarded as between buyer and seller.

In my opinion the true rule is that where there is an anticipatory breach by a seller to deliver goods for which there is a market at a fixed date the buyer without buying against the seller may bring his action at once, but that if he does so his damages must be assessed with reference to the market price of the goods at the time when they ought to have been delivered under the contract. If the action comes to trial before the contractual date for delivery has arrived the Court must arrive at that price as best it can.

To this rule there is one exception for the benefit of the defaulting seller—namely, that if he can show that the buyer acted unreasonably in not buying against him the date to be taken is the date at which the buyer ought to have gone into the market to mitigate damages.

I have discussed the position on principle apart from authority because, in my limited experience, I do not remember a case precisely like this.

I might perhaps have contented myself with basing my judgment upon the authority of *Roper* v. *Johnson* (1), and I should have done so but for the fact that I am not sure that when that case was decided one year after *Brown* v. *Muller* (2) the distinction between an accepted and unaccepted repudiation was as well established as it has since become. There are some observations in the judgments in that case which would not, I venture to think, now be supported, and the case turned largely on where the burden of proof lay. Subject however to these criticisms *Roper* v. *Johnson* (1) seems to me to support the conclusion at which I have arrived.

The result in this case is that the damages are nominal.

Solicitors for sellers: *Thomas Cooper & Co.*

Solicitors for buyers: *Botterell & Roche.*

J. E. A.

(1) L. R. 8 C. P. 167.

(2) L. R. 7 Ex. 319.

1919
Dec. 11.

OWNERS OF STEAMSHIP RICHARD DE LARRINAGA *v.* COMMISSIONERS FOR EXECUTING THE OFFICE OF LORD HIGH ADMIRAL OF THE UNITED KINGDOM.

Insurance (Marine)—War Risk—Warship on Voyage to pick up Convoy—Collision with Merchant Vessel—Absence of Navigation Lights—"Consequences of hostilities or warlike operations."

On the night of July 23, 1917, a merchant vessel was sailing in convoy from the United States to England, and, in obedience to Admiralty orders, was steaming without lights. The night was very dark. The convoy was moving at six to seven knots. One of His Majesty's warships was at the same time on a voyage to pick up a convoy of merchant vessels and was steaming without lights at twelve knots. The two ships sighted one another at close quarters and a collision occurred in which both ships were damaged. There was no negligence in the navigation of either ship. The merchant ship was insured under a marine risk policy containing the usual f. c. and s. clause and a war risk policy which covered "all consequences of hostilities or warlike operations, by or against the King's enemies":—

Held, that the war risk underwriters must bear the loss, inasmuch as although the warship was not actually at the material moment engaged in convoying vessels but was going to a point at which she was to take up the duty of escorting a convoy, she was engaged in a warlike operation and the collision was therefore a consequence of a warlike operation.

AWARD in the form of a special case stated by an arbitrator.

The claim in the arbitration arose out of a collision between the steamship *Richard de Larrinaga* and H.M.S. *Devonshire* in the Atlantic Ocean on July 23, 1917.

At the time in question the *Richard de Larrinaga* was sailing in convoy at a speed of about six or seven knots an hour. In obedience to Admiralty orders she was exhibiting no lights. The night was very dark. H.M.S. *Devonshire* had been on duty at Halifax and was on a voyage to Hampton Roads to pick up a convoy of merchant vessels. She was making a speed of about twelve knots an hour and was exhibiting no lights. The two ships sighted one another at close quarters and very shortly afterwards the collision occurred. A good lookout was being kept on each.

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RICHARD DE LARRINAGA (Owners of S.S.) *v.* ADMIRALTY COMMISSIONERS

By a memorandum of agreement made November 2, 1918, between the owners of the *Richard de Larrinaga* of the one part, the Liverpool and London War Risks Insurance Association of the second part, certain marine underwriters as set out in the schedule thereto of the third part and the Treasury Solicitor for and on behalf of the Commissioners for executing the office of Lord High Admiral of the United Kingdom of the fourth part, the questions of liability for the collision, and whether the damages sustained by H.M.S. *Devonshire* and the *Richard de Larrinaga* respectively, arose from a marine or a war peril were referred to the arbitrator.

On June 18, 1919, the arbitrator issued an interim award, whereby he determined that it was not established that either of the ships was to blame for the collision. Subsequently the marine underwriters and the War Risks Insurance Association came before him for the determination of the question whether the collision arose from a marine or from a war peril. By clause 2 of the war risks policy upon the *Richard de Larrinaga* it was provided that: "This insurance is only to cover the risks of capture, seizure, and detainment by the King's enemies, and the consequences thereof or any attempt thereat, and all consequences of hostilities or warlike operations by or against the King's enemies whether before or after declaration of war, but this insurance shall not be subject to a three per cent. or other franchise."

Clause 9: "The said ship shall be deemed to be at all times fully insured against all perils covered by an ordinary Lloyd's policy with collision clause attached and containing an f. c. and s. clause in the following terms: 'Warranted free from capture, seizure, and detention, and the consequences thereof, or any attempt thereat, barratry, piracy, riots, and civil commotions excepted and also from all consequences of hostilities or warlike operations, whether before or after declaration of war.' And to be fully entered in the Liverpool and London Steamship Protection Association Limited and no claim whatever against which a ship is deemed to be otherwise insured or protected as aforesaid or against which she is in fact insured or protected by any other insurance policy or Protection Association shall be recoverable under this policy."

It was contended by counsel on behalf of the marine underwriters that the collision arose from a war peril and was a consequence of hostilities or warlike operations because the collision was caused by the fact that in obedience to Admiralty orders, (1.) the two ships were navigating on a dark night without lights; (2.) that as the *Richard de Larrinaga* was sailing in convoy she was engaged in a "warlike operation" and that fact was the cause of the collision; and (3.) that H.M.S. *Devonshire* was a warship engaged in a warlike operation, and that a collision with her was in the circumstances a consequence of "hostilities or warlike operations."

On behalf of the war risk underwriters it was contended that the collision was caused by a marine and not a war peril, and was not a consequence of "hostilities or warlike operations."

It was urged that the fact that the cause of the collision was the absence of lights in obedience to Admiralty orders did not make it a consequence of hostilities or warlike operations, that the fact that the *Richard de Larrinaga* was sailing in convoy did not constitute a warlike operation, that H.M.S. *Devonshire*, although a warship, was not performing a warlike operation, but was at the time in question engaged on a peaceful errand—namely, on a voyage for the purpose of picking up and protecting a convoy of merchant ships and that a collision with her was not a consequence of "hostilities or warlike operations."

The question in dispute was whether the collision arose from a marine or a war peril.

Subject to the opinion of the Court the arbitrator determined that the collision was a consequence of hostilities or warlike operations and was caused by a war peril, and he awarded that the war risks underwriters were liable and should pay the costs of this part of the reference and also of the award.

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RICHARD DE LARRINAGA (Owners of S.S.) *v.* ADMIRALTY COMMISSIONERS.

Raeburn K.C. and *S. L. Porter* for the war risk underwriters.

R. A. Wright K.C. and *Miller K.C.* for the marine risk underwriters and for the owners of the vessel *Richard de Larrinaga.*

The Admiralty Commissioners did not appear, the real dispute being between the owners and marine risk underwriters on the one hand, and the war risk underwriters on the other. The points discussed during the arguments sufficiently appear from the judgment.

[The following authorities were referred to in addition to those cited in the judgment: *Henry and MacGregor* v. *Marten* (1); *The Larchgrove* (2); *Cory* v. *Burr* (3); *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society* (4); and Arnould on Marine Insurance, 9th ed., vol. ii., p. 1030, s. 822.]

BAILHACHE J. This case raises again, in slightly different circumstances from those which existed in cases hitherto reported, the much debated question whether the loss of or damage to a ship at sea is to fall upon the war risk or marine risk underwriters. The *Richard de Larrinaga* was insured under two policies, the marine risks policy, containing the usual f. c. and s. clause, and the war risks policy containing the clause: "This insurance is only to cover the risks of capture, seizure, and detainment by the King's enemies, and the consequences thereof or any attempt thereat, and all consequences of hostilities or warlike operations by or against the King's enemies, whether before or after declaration of war. . . . "

The material facts are extremely simple. The collision occurred at night between the *Richard de Larrinaga*, a merchant ship, and H.M.S. *Devonshire.* Both ships were proceeding without lights and the collision occurred whilst the *Devonshire* was between Halifax and the Hampton Roads. She was proceeding to her station at Hampton Roads in order to pick up some vessels which she was to convoy; she

(1) [1918] W. N. 224.

(2) (1919) Lloyd's List, Dec. 2.

(3) (1883) 8 App. Cas. 393.

(4) [1917] 1 K. B. 873.

was therefore proceeding to take up her duties as a convoying ship when the collision unfortunately happened. The question to be decided is whether the damage to the *Richard de Larrinaga* falls upon the marine risks or the war risks underwriters. Now, it is clear that the primary—the actual proximate—cause of the loss was the collision, and if all the risks were covered by one policy it would be unnecessary to inquire further, but in all these cases where the marine risks are covered by one policy and war risks by another, and where it is necessary to inquire whether the loss was due to a cause which would prima facie fall upon the marine risks underwriters, one has to go a step further back to know what was the proximate cause—if I may so call it—of the actual cause of the loss. I make that remark in consequence of some observations which were made in the Court of Appeal in *British India Steam Navigation Co.* v. *Green* (*The Matiana Case*) (1) with reference to the proximate cause of the loss in that case. In the present case one has to inquire what was the actual proximate cause of the collision—the collision being prima facie a marine risk.

The actual cause of the collision was that both ships were proceeding without lights at night. The mere fact that two merchant vessels are proceeding without lights at night does not constitute a war risk. That was decided in *Britain Steamship Co.* v. *The King* (*The Petersham Case*) (2), which was upheld in the Court of Appeal. (1) In *Ard Coasters* v. *The King* (3) it was held that where there was a collision between a merchant vessel and a patrol boat, both proceeding at night without lights, and the patrol boat being actively employed on her duties, the collision was due to a war risk because the patrol boat was actively engaged upon her duties as a patrol. The necessary inference from the judgment of the Court of Appeal in *The Matiana Case* (1) is that where ships are proceeding under convoy, the movements of His Majesty's ships which are protecting the convoyed ships are warlike operations. I held

(1) [1919] 2 K. B. 670.

(2) [1919] 1 K. B. 575.

(3) (1919) 35 Times L. R. 604.

in that case that the whole convoy was to be treated as one entity, and that no distinction was to be drawn between the convoyed and the convoying ships. The Court of Appeal pointed out that I was wrong there, and Atkin L.J., using a picturesque phrase, said that I must have confused the shepherd with the sheep; but there seems to be no doubt that the ships actually convoying—His Majesty's ships which were conducting the convoy—were engaged in warlike operations. I do not think that very much assistance is to be obtained from *British and Foreign Steamship Co.* v. *The King* (*The St. Oswald Case*) (1), which proceeded, as the Court of Appeal pointed out in *The Matiana Case* (2), upon admissions made by the Crown, admissions which seem to have made the result inevitable. Leaving that case out of account I think that, upon the authorities, the following propositions are established—namely, that where one of His Majesty's ships is sailing at night without lights and is engaged in hostile duties such as looking for submarines, and collides with another ship, the collision is a consequence of hostilities. The result is the same if one of His Majesty's ships is engaged in convoying other ships, and they are sailing without lights at night and a collision occurs. That collision is a consequence of hostilities or warlike operations. The question which remains, and which is not absolutely covered by authority, is what is the position in such a case as the present one where one of His Majesty's ships is sailing at night without lights, but is not at the moment actively engaged in definite warlike operations—such as patrolling and being on the lookout for submarines, or actually convoying ships—but is proceeding to her station for the purpose of taking up her duties there as a convoying ship. Atkin L.J. in *The Petersham Case* (3) said: "I incline to think that during war almost any action or movement of the combatant forces in the course of their combatant duties, while exercised in the area of war, could be included." I think that when one of His Majesty's ships is proceeding

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(1) [1917] 2 K. B. 769; [1918] 2 K. B. 879.

(2) [1919] 2 K. B. 670.

(3) Ibid. 670, 695.

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RICHARD DE LARRINAGA (Owners of S.S.) v. ADMIRALTY COMMISSIONERS.

Bailhache J.

to her station to take up her duties as a convoying ship she is engaged on a warlike operation. Indeed, I think, agreeing with respect with the view expressed by Atkin L.J. in the passage to which I have referred, that almost any movement in war time at sea of one of His Majesty's ships is a warlike operation. I do not think any assistance is gained from illustrations with regard to matters which take place on land, particularly in this country. When a movement of one of His Majesty's ships is being dealt with, the true analogy—if analogy be sought—is a movement of an army in an enemy country, because the whole sea is an enemy country. To take the case where two nations are at war, it may be that, so far as one of the belligerents knows, there is not one of the enemy's warships within a reasonable distance, but at the same time it is necessary, particularly in these days of submarines, if there is a danger of their being present, to keep a vigilant lookout, for a submarine attack may take place at any moment, and, in my opinion, when one of His Majesty's ships is proceeding either to take up her station in the line with the fleet or to take up her station in order to act as a convoying ship, or indeed, as I think, is engaged in almost any movement on the high seas, she is engaged in a warlike operation. If it is night, part of the warlike operation is to sail without lights, and if, as a result of that, a collision takes place, then although a collision is prima facie a marine risk, one has to carry the inquiry further back in order to ascertain whether it falls within one insurance policy or the other. The collision in this case was due to the warlike operation, and therefore it falls on the war risk underwriters. That is what the arbitrator has found in the present case, and, in my judgment, his award is right and must be upheld.

Award upheld.

Solicitors for war risk underwriters: *Thomas Cooper & Co., for Hill, Dickinson & Co., Liverpool.*

Solicitors for marine risk underwriters and for shipowners: *Charles Lightbound & Co.*

J, E, A,

BICKERDIKE *v.* LUCY.

1920
Jan. 22.

Agricultural Workman—Gardener—Minimum Wage—Sale of surplus Produce of private Garden—" Market garden "—Corn Production Act, 1917 (7 *&* 8 *Geo.* 5, *c.* 46), *s.* 4, *sub-s.* 1 ; *s.* 17, *sub-s.* 1 (*a*).

The fact that the occupier of a country house sells regularly one-half of the produce of the gardens occupied therewith does not constitute the gardens a "market garden" within the meaning of s. 17, sub-s. 1 (*a*), of the Corn Production Act, 1917, and he is not bound to pay wages to his gardeners at the minimum rate fixed for " workmen in agriculture " under that Act.

CASES stated by justices of Warwick.

The respondent, Lady Fairfax-Lucy, was summoned on an information charging that she in respect of the weeks ending May 24, 1919, and July 26, 1919, being a person employing a workman in agriculture, to wit, one James Beal, did unlawfully fail to pay him wages at a rate not less than the minimum rate fixed under the Corn Production Act, 1917.

At the hearing the following facts were proved or admitted : (1.) The respondent is the owner and occupier of a mansion house and estate known as Charlecote Park ; with the property are gardens suitable to the house including walled-in garden, with fruit trees, glass and hot houses, flower and vegetable gardens, and orchards, and covering some four acres in extent with the lawns and walks.

(2.) James Beal was sixty-three years of age and was employed by the respondent at Charlecote Park together with others. The wages paid to Beal were less than the minimum rates payable to a workman in agriculture under the orders published by the Agricultural Wages Board pursuant to the Corn Production Act, 1917.

(3.) The house was supplied with produce from the gardens, and when the family were not in residence there such produce as they required was sent to them from time to time, generally once a week.

(4.) Surplus fruit and vegetables from the gardens were from time to time sold, and during the periods following the amounts realized from such sales were as follows: January, 1919, 3*l.* 5*s.*, February 3*l.* 14*s.* 2*d.*, March 4*l.* 8*s.* 3*d.*, April 3*l.* 11*s.* 10*d.*, May 8*l.* 18*s.* 9*d.*, June 7*l.* 13*s.* 5*d.*, July 14*l.* 0*s.* 4*d.*, and August 14*l.* 2*s.* 2*d.* Total 59*l.* 13*s.* 11*d.*

(5.) Taking an average throughout the year about 50 per cent. of the produce grown in the gardens was usually sold. The quantity sold varied according to the season and to the necessities of the house.

(6.) It was not possible to carry on the gardens as a market garden except at a pecuniary loss as the gardens in their then state were not adapted or laid out for the purpose.

By s. 4, sub-s. 1, of the Corn Production Act, 1917, "Any person who employs a workman in agriculture shall pay wages to the workman at a rate not less than the minimum rate as fixed under this Act and applicable to the case," subject to a penalty for non-compliance.

By s. 17, sub-s. 1, "For the purposes of this Act—(*a*) the expression 'agriculture' includes the use of land . . . . for market gardens or nursery grounds."

On behalf of the informant it was contended that the respondent's gardens were used as a market garden. The justices' attention was called to *In re Wallis*; *Ex parte Sully* (1), to s. 48 of the Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28), which defines a "market garden" as "a holding cultivated, wholly or mainly, for the purpose of the trade or business of market gardening," and to Wharton's Law Lexicon, which defines it as "a garden in which vegetables and fruit are grown for sale." They held that the respondent's gardens were not a market garden within the meaning of the Corn Production Act, 1917, and dismissed the information.

The informant appealed.

Roland Oliver for the appellant. There is no definition of a market garden in the Corn Production Act. It is contended that it means any garden a substantial part of the produce of which is regularly sold, and provided that condition is satisfied it is immaterial whether the garden is cultivated for the purpose of a trade or business or not. The justices were influenced by the definition in the Agricultural Holdings Act. But the definition of a term in one Act is no guide to its meaning in another. The purposes of the two Acts are different. That of the Agricultural Holdings Act was to fix the compensation for improvements payable to the outgoing tenant of a holding which he had occupied as a business. That of the Corn Production Act is to fix for agricultural workmen the minimum wage which will enable them to maintain their families in reasonable comfort, and the amount of that wage must be independent of the question whether their employers are engaged in agriculture as a pleasure or as a business. Suppose the owner of a large private garden to live in the immediate neighbourhood of a professional market gardener, and suppose both parties to send their produce to the same local market, the private owner would compete very unfairly with his professional neighbour if he were allowed to pay his workmen a lower wage for doing the same work.

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(1) (1885) 14 Q. B. D. 950.

Maddocks for the respondent. The expression "market garden" in the Corn Production Act means what it is defined to mean in the Agricultural Holdings Act, that is to say, the produce must not merely be sold, it must be grown for sale; the primary object of the cultivation of the garden must be the earning of money.

EARL OF READING C.J. This appeal fails. It is brought for the purpose of getting a decision of this Court as to whether or not on the facts found in this case Lady Fairfax-Lucy employed one James Beal as a workman in "agriculture" within the definition of that term in s. 17, sub-s. 1 (*a*), of the Corn Production Act, 1917. The sole question is whether the fact that she sells throughout the year approximately fifty per cent. of the produce of four acres of land occupied by her as a garden at Charlecote Park constitutes her a market gardener. Does she carry on the trade or business of a market gardener? It is true that the words "trade or business of a market gardener" are not to be found in the Act of 1917, but I think that that is what the Legislature meant, and I am prepared to adopt as the definition of "market garden" for the purposes of that Act the definition which I find in s. 48 of the Agricultural Holdings Act, 1908 —namely, "a holding cultivated wholly or mainly for the purpose of the trade or business of market gardening." I do so not because the definition in one Act binds me to interpret the same term in the same way in another Act, but because the definition in the Act of 1908 appropriately expresses what I understand to be the meaning of the term as used in the Act of 1917. I find the words "market gardens" in the latter Act coupled with "nursery grounds," and it is obvious that the expression "nursery grounds" means land occupied for the purpose of the business of a nurseryman. A market garden must therefore equally be understood as land occupied for the purpose of the trade or business of a market gardener. Mr. Oliver has argued that the purposes of the two Acts are different. Be that as it may I am satisfied that the meaning of the expression "market garden" in both Acts is the same. If that is so *In re Wallis*; *Ex parte Sully* (1) is a direct authority that the respondent in this case does not use her land for a market garden. Cave J. there decided that an occupier of a country house who sold the surplus produce of his greenhouses, hot-houses and gardens at a profit did not thereby carry on a "trade or business" within s. 44 of the Bankruptcy Act, 1883. I am of opinion that the justices were right in this case in coming to the conclusion that the respondent's gardens were not a market garden within the meaning of the Corn Production Act.

AVORY J. I agree that the magistrates were right, and that the man Beal, who would in ordinary language be called a gardener, was not a "workman in agriculture" within s. 4, sub-s. 1, of the Act of 1917. I do not say that a person occupying a house of this description with a garden, orchard

(1) 14 Q. B. D. 950.

and glasshouses cannot possibly come within the terms of the Act, but he can only do so if it is found as a fact that the garden or grounds are cultivated either wholly or mainly for the purposes of the trade or business of market gardening. It is conceivable that under certain circumstances there might be a finding to that effect, but I am quite satisfied that the sale of the surplus produce in this case was ancillary to the main purpose for which the gardens were used and enjoyed. The decision of Cave J. in the case to which my Lord has referred must, I think, be taken as a decision that an occupier of residential property who sells his surplus fruit and vegetables does not thereby become a market gardener.

Sankey J. I agree.

Appeal dismissed.

Solicitors for the respondent: *Wright, Hassall & Co., Leamington.*

J. F. C.

JONES v. COMMISSIONERS OF INLAND REVENUE.

1919
July 22.

Revenue—Supertax—Sale of Invention—Payment of Lump Sum and Percentage on Sales—Annual Payments—Income Tax Act, 1842 (5 *&* 6 *Vict., c.* 35), *s.* 102—*Finance* (1909-10) *Act,* 1910 (10 *Edw.* 7, *c.* 8), *s.* 72.

The appellant sold his interest in certain inventions and letters patent for a sum in cash and a percentage, called a "royalty," payable for ten years on the sale of all machines constructed under the patent:—

Held, that the sums received by the appellant in respect of the royalty were taxable income and were properly included in computing the appellant's total income for the purpose of supertax.

Case stated by Commissioners for the Special Purposes of the Income Tax Acts.

The appellant appealed against an assessment to supertax in the sum of 5266*l.* for the year ending April 5, 1917, and the sole question was whether a sum of 3828*l.*, the gross amount of certain amounts received by the appellant in the year ending April 5, 1916, in the circumstances hereinafter mentioned, should be excluded in computing his total income for that year for the purpose of supertax for the year ending April 5, 1917.

The appellant and one Thresh were the inventors of certain disinfecting apparatus, in respect of which they held letters patent. Before September 23, 1913, the appellant and Thresh were the sole directors of and shareholders in Thresh's Disinfector Co., Ld. This company manufactured and sold disinfecting apparatus under a licence from the appellant and Thresh and had established a goodwill in connection with the business. By an indenture dated September 23, 1913, made between the appellant and Thresh, the vendors, of the first part, Thresh's Disinfector Co. Ld., of the second part, and Summerscales, Ld., the purchasers, of the third part, the vendors agreed to sell to the purchasers for 750*l.*, and in consideration of the royalties thereinafter mentioned, the inventions and letters patent and all rights, etc., appertaining thereto, and the goodwill of the said Thresh's company, with the right to use that name, etc. By cl. 2 of that indenture the purchase-money of 750*l.* was to be paid as to 300*l.* thereof as follows: 100*l.* on the signing of the agreement, 100*l.* at the expiration of one year, and 100*l.* at the expiration of two years from the date thereof, and as to the balance of 450*l.* by a royalty of 5 per cent. upon the invoiced price of all machines sold by the purchasers until the royalty should amount to 450*l.* In addition the purchasers were to pay a further royalty to the vendors of 10 per cent. upon all sales of machines and parts thereof constructed under the said inventions for a period of ten years from the date of the indenture computed on the invoice price. Clause 15 provided that if the purchasers should discontinue the manufacture of disinfectors according to the said inventions or should not manufacture at least six machines in any one year commencing August 1, 1913, the unpaid balance of the said consideration money of 750*l.* should immediately become payable together with a sum of 150*l.* per annum for the unexpired period of the agreement

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for the loss of the said royalty of 10 per cent. thereinbefore provided.

The appellant admitted that the purchasers had, up to and including the year ending April 5, 1917, deducted income tax upon payment of the royalties.

For the appellant it was contended (*a*) that the term "royalties" as described in the indenture was a misnomer; (*b*) that income tax had been deducted from the "royalties" under a misapprehension, as was evidenced by the fact that the purchasers had subsequently refunded to the appellant the several sums so deducted; (*c*) that the "royalties" were not in respect of the user of a patent; and (*d*) that the said "royalties" formed part of the purchase price paid for the inventions and letters patent and constituted capital and not income.

For the respondents it was contended (*a*) that the question fell to be decided upon the terms of the indenture alone; (*b*) that the royalties in question were sums paid for the use of a patent and that income tax had rightly been deducted from them; and (*c*) that in any event the said sums were annual payments within the meaning of the Income Tax Acts and were properly included in the assessment the subject of the appeal.

It was agreed that the royalties in so far as they were paid in satisfaction of the 750*l.* should not be included in computing the appellants' total income.

A. M. Latter for the appellant. The payments called "royalties" in the indenture made to the appellant were part of the purchase price of the inventions, and being the payment of a debt are not income within the Income Tax Acts: *Foley* v. *Fletcher* (1), *Secretary of State for India* v. *Scoble* (2); *Oswald* v. *Kirkcaldy Magistrates.* (3) The last cited case strongly supports the view now contended for.

Sir Ernest Pollock S.-G. (*T. H. Parr* and *R. P. Hills* with him) for the respondents. This case is governed by

(1) (1858) 3 H. & N. 769.

(2) [1903] A. C. 299.

(3) 1919 S. C. 147.

Chadwick v. *Pearl Life Assurance Co.* (1) There Walton J. said: "It is obvious that there will be cases in which it will be very difficult to distinguish between an agreement to pay a debt by instalments, and an agreement for good consideration to make certain annual payments for a fixed number of years. In the one case there is an agreement for good consideration to pay a fixed gross amount and to pay it by instalments; in the other there is an agreement for good consideration not to pay any fixed gross amount, but to make a certain, or it may be an uncertain, number of annual payments. The distinction is a fine one, and seems to depend on whether the agreement between the parties involves an obligation to pay a fixed gross sum." Here there was no obligation to pay a fixed gross sum; nor was there in *Delage* v. *Nugget Polish Co.* (2) where Phillimore J. pointed out that both in *Foley* v. *Fletcher* (3) and in *Secretary of State for India* v. *Scoble* (4) there was first the ascertainment of a lump sum and the annual payment was an instalment of that lump sum.

Latter replied.

ROWLATT J. In my judgment this appeal fails. It has been urged by Mr. Latter that the annual payment now in question being 10 per cent. upon the sales of machines for ten years is part of the consideration which was paid for the transfer from the appellant of his property. So it is, but there is no law of nature or any invariable principle that because it can be said that a certain payment is consideration for the transfer of property it must be looked upon as price in the character of principal. In each case regard must be had to what the sum is. A man may sell his property for a sum which is to be paid in instalments, and when that is the case the payments to him are not income: *Foley* v. *Fletcher*. (3) Or a man may sell his property for an annuity. In that case the Income Tax Act applies. Again, a man may sell his property for what looks like an annuity, but which

(1) [1905] 2 K. B. 507, 514.
(2) (1905) 92 L. T. 682.
(3) (1858) 3 H. & N. 769.
(4) [1903] A. C. 299.

can be seen to be not a transmutation of a principal sum into an annuity but is in fact a principal sum payment of which is being spread over a period and is being paid with interest calculated in a way familiar to actuaries—in such a case income tax is not payable on what is really capital: *Secretary of State for India* v. *Scoble.* (1) On the other hand, a man may sell his property nakealy for a share of the profits of the business. In that case the share of the profits of the business would be the price, but it would bear the character of income in the vendor's hands. *Chadwick* v. *Pearl Life Assurance Co.* (2) was a case of that kind. In such a case the man bargains to have, not a capital sum but an income secured to him, namely, an income corresponding to the rent which he had before. I think therefore that what I have to do is to see what the sum payable in this case really is. The ascertainment of an antecedent debt is not the only thing that governs, although in many cases it is a very valuable guide. In this case there is no difficulty in seeing what was intended. The property was sold for a certain sum, and in addition the vendor took an annual sum which was dependent upon the volume of business done; that is to say, he took something which rose or fell with the chances of the business. When a man does that he takes an income; it is in the nature of income, and on that ground I decide this case.

I was pressed with the Scottish case of *Oswald* v. *Kirkcaldy Magistrates.* (3) In that case the facts were that the magistrates constructed a sewer through the lands of a proprietor. When they agreed to do this they saw that the sewer rate would not pay for the sewer for many years. Accordingly they made an agreement by which the proprietor should pay them an annual sum. The Court of Session held that these annual payments were not income; the town council was not getting income, but was simply protecting itself against a deficiency of the sewer rate, or was taking a price for the construction of the sewer before it would pay for itself.

(1) [1903] A. C. 299,
(2) [1905] 2 K. B. 507, 514.
(3) 1919 S. C. 147.

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Rowlatt J.

As I have said, one has in each case to look at what the sum really is. Applying that test in the present case, I have no doubt that the amount payable to the appellant was taxable income in his hands and was therefore properly included in computing his total income for the purpose of supertax.

Appeal dismissed.

Solicitors for appellant: *Holmes, Son & Pott.*
Solicitor for respondents: *Solicitor of Inland Revenue.*

(1) 1919 S. C. 147.

J. S. H.

1919
Oct. 22.

HOLLANDS, APPELLANT *v.* WILLIAMSON, RESPONDENT.

Revenue—Carriage—Licence—Carriage with four Wheels propelled by mechanical Power—Tricycle with Auto-wheel attached—Customs and Inland Revenue Act, 1888 (51 *Vict. c.* 8), *s.* 4.

By s. 4, sub-s. 1, of the Customs and Inland Revenue Act, 1888, a duty of excise is expressed to be payable "for every carriage as hereinafter defined—If such carriage shall have four or more wheels, and .... shall be drawn or propelled by mechanical power—2*l.* 2*s.* 0*d.*"

The term "carriage" is defined in s. 4, sub-s. 3, as meaning and including "any carriage (except a hackney carriage) .... drawn or propelled upon a road or tramway, or elsewhere than upon a railway by steam or electricity or any other mechanical power. ...."

A tricycle to which an auto-wheel is attached and by which it is propelled is a carriage having four wheels propelled by mechanical power within the definition contained in s. 4, sub-s. 3, of the Customs and Inland Revenue Act, 1888, and is therefore liable to excise duty.

CASE stated by Surrey Justices.

An information was preferred by the appellant, George Hollands, against the respondent, Frederick Arthur Williamson, charging him with unlawfully keeping a certain carriage, for the keeping of which a licence was required by statute without having taken out a licence.

At the hearing of the information the following facts were proved or admitted :—

The respondent was thirty-eight years of age, and had since the year 1914 been a clerk in the employ of a wheelwright whose place of business was about 1½ miles distant from the respondent's house. In September, 1915, the respondent purchased a second-hand tricycle to convey him to and from his daily work. He had the tricycle fitted with two revolving handles, with a chain and sprocket, which enabled him to propel it with his arms and hands. He used the tricycle as a hand-propelled machine until June, 1918, when he purchased a second-hand "Wall auto-wheel," which consisted of a small pneumatic-tyred wheel, 20in. in diameter, propelled by mechanical power—namely, a petrol combustion-engine of under 1 horse-power—the whole appliance weighing 40lb. The purpose to which the auto-wheel was ordinarily and primarily intended to be put and for which it was specially adapted was for attachment to a bicycle, but it was capable of being easily attached to any similar kind of vehicle. The auto-wheel was attached to the tricycle by means of nuts and bolts, and could easily and quickly be detached and reattached. As no provision had been made in the original construction of the tricycle for the attachment of an auto-wheel thereto, a bracket, consisting of two upright steel bars, had been constructed and secured rigidly in position at the rear of the vehicle by means of two steel stays bolted to the original framework of the tricycle, which were connected with the front of the auto-wheel by a steel bolt. The auto-wheel was capable of being raised off the ground and lowered by the hand of the rider while in his seat, and without being detached from the tricycle, but could not be kept off the ground unless held by the rider or fastened by a strap or other attachment to the tricycle. The respondent purchased the auto-wheel for the purpose of attaching it to the tricycle, and by the mechanical means thereby provided propelling the machine or assisting and reinforcing the normal method of propulsion contemplated by the original design and construction and subsequent adaptation of the machine as a hand-propelled tricycle, and he had in fact always used it for that purpose. The respondent commenced to use the tricycle with the auto-wheel attached in October, 1918, and had ever since continued to use the same for the purpose and in the manner above described. The respondent sometimes propelled the tricycle by means of the revolving handles alone, sometimes—when once started—by means of the auto-wheel alone, and sometimes by means of both handles and auto-wheel together, but he could never commence to use the auto-wheel without first propelling the tricycle by means of the revolving handles until the engine began to fire. At the time of the alleged offence the tricycle was being propelled by means of the auto-wheel alone.

It was contended for the appellant that the tricycle with the auto-wheel attached was a carriage having four or more wheels and propelled by mechanical power within the definition in s. 4, sub-s. 1, of the Customs and Inland Revenue Act, 1888.

The justices were of opinion that the mere temporary attachment of an auto-wheel as an auxiliary to a machine constructed and always complete and capable of being used as a hand-propelled tricycle, and the intermittent user of the auto-wheel when attached, did not change the original character of the vehicle as originally constructed, and that upon the facts proved or admitted and their own personal inspection and examination of the vehicle it was not a carriage within the meaning of the Act. They accordingly dismissed the information.

The question for the opinion of the Court was whether the justices upon the above statement of facts came to a correct decision in point of law.

G. C. Whiteley for the appellant. This tricycle to which the auto-wheel has been attached is a carriage within the meaning of s. 4 of the Customs and Inland Revenue Act, 1888. The fact that the auto-wheel may be easily detached from the tricycle makes no difference. When the auto-wheel is attached it is used in conjunction with the three other wheels of the

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tricycle, and when it is so used the vehicle has four wheels and is propelled by mechanical power and must come within the definition in the section. The Courts have already held in *O'Donoghue* v. *Moon* (1) that a motor bicycle is a carriage within the meaning of the Act, and in *Elieson* v. *Parker* (2) that an electrically propelled bathchair is a motor car, as it was a vehicle propelled by mechanical power. If this vehicle is a carriage the result will be that under s. 86, sub-s. 9, of the Finance (1909–10) Act, 1910, it is also a motor car and subject to the statutory regulations with regard to motor cars. That is, however, no ground for holding that this vehicle is not a carriage.

The respondent in person. If this tricycle is a carriage it will also be a motor car and subject to the statutory regulations relating to motor cars as to lamps and registration plates. It will however be impossible to comply with those regulations.

EARL OF READING C.J. This appeal must be allowed. Having regard to the definition of the word "carriage" in s. 4, sub-s. 3, of the Customs and Inland Revenue Act, 1888, we are bound to say that this tricycle with the auto-wheel attached has become a carriage. It is impossible to say that the tricycle did not become a carriage within the definition in that section when it had a fourth wheel attached to it and when it was propelled by means of mechanical power. The result of our decision is that under s. 86 of the Finance (1909–10) Act, 1910, if this tricycle is propelled by mechanical power it also becomes a motor car. It seems perfectly absurd to call it a motor car, but we are bound by the terms of the Act to hold that it is a carriage, and the result is that as it is propelled by mechanical power the Act of 1910 makes it a motor car. This decision may create difficulties, because there are statutory requirements with regard to motor cars which were never intended to apply to carriages of this description. As however this is a question of principle, and as our decision will

(1) (1904) 68 J. P. 349; 90 L. T. 843.

(2) (1917) 81 J. P. 265; 117 L. T. 276.

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affect a considerable number of vehicles of a similar character, the appellant is entitled to obtain the decision of this Court with regard to it.

AVORY and SANKEY JJ. concurred.

Appeal allowed.

Solicitor for appellant: *T. W. Weeding*, Kingston-on-Thames.

R. F. S.

C. A.

1919

Oct. 24, 27; *Nov.* 21.

[IN THE COURT OF APPEAL.]

HEMMINGS AND WIFE *v.* THE STOKE POGES GOLF CLUB, LIMITED, AND ANOTHER.

[1918. H. 1567.]

Forcible Entry—Assault—Trespass—Right of Defendant to enter—5 Ric. 2, stat. 1, *c.* 7.

The statute 5 Ric. 2, stat. 1, c. 7, provides that none make any entry into any lands and tenements, but in case where entry is given by the law; and in such case not with strong hand, nor with multitude of people, but only in peaceable and easy manner; and that if any man do to the contrary, and thereof be duly convict, he shall be punished by imprisonment of his body, and thereof ransomed at the King's will.

The plaintiffs, a man and his wife, lived in a cottage belonging to the defendants, the man being in their service and being required by them to live in the cottage as part of his service and for the performance of his duties. He left their service, but refused to give up the cottage after notice to quit duly given. Thereupon by command of the defendants several persons entered the cottage and removed the plaintiffs and their furniture, using no more force than was necessary for that purpose. In an action by the plaintiffs for assault, battery and trespass:—

Held, that the defendants were not liable, their right of entry being a defence to civil proceedings for the acts complained of.

Newton v. *Harland* (1840) 1 Sc. N. R. 474; 1 Man. & G. 644; *Beddall* v. *Maitland* (1881) 17 Ch. D. 174; and *Edwick* v. *Hawkes* (1881) 18 Ch. D. 199 (so far as it followed those cases) overruled.

Judgment of Peterson J. reversed.

APPEAL from the judgment of Peterson J. sitting in the King's Bench Division.

The action was for trespass, assault and battery. The statement of claim alleged that on August 2, 1918, the defendants with a strong hand and multitude of people broke and entered into a dwelling-house of which the plaintiffs were in possession situate at Stoke Park, Stoke Poges, Slough, in the county of Bucks, and forcibly laid hands on the plaintiffs and assaulted them and ejected them and their family with their goods and chattels from the said dwelling-house.

The defendants pleaded that they were at all material times the owners and occupiers of the dwelling-house and that the plaintiff James Hemmings was formerly their servant and lived in the dwelling-house as required by the defendants for the proper performance of his duties and not otherwise, and that the plaintiff Sarah Hemmings lived in the house as the wife of James Hemmings; that in May, 1918, James Hemmings left the service of the defendants but refused to give up the dwelling-house; and that on August 2, 1918, the defendant company by the defendant Jackson, their controlling director, as they lawfully might, instructed their servants and agents to enter the dwelling-house and remove the plaintiffs therefrom together with their family and their goods and chattels, and that accordingly the said servants and agents entered the dwelling-house, as they lawfully might, and gently laid hands on the plaintiffs in order to remove them and did remove them together with their family and goods and chattels from the dwelling-house doing no more than was necessary for that purpose.

The following statement of facts is taken in substance from the judgment of Peterson J.

The plaintiff, James Hemmings, was in the employment of the Stoke Poges Golf Club, the defendants, in the year 1918, and had been so since the year 1909. In the year 1909 he occupied a cottage belonging to Mrs. Jackson, the golf club paying the rent. But in the year 1913 a new cottage was erected on the golf club premises. That was completed in the year 1914, together with a garage which adjoined it, and a chauffeurs' room. The new cottage was occupied by the plaintiff, James Hemmings. In the cottage telephones were put in the front room against the wish of the plaintiff, James Hemmings, who wanted them put in another room, but the defendant Jackson insisted that the telephones should be placed in the front room, which was to be in the nature of an office for the plaintiff, James Hemmings, in carrying out the duties imposed upon him. He had not the sole use of the telephones. According to the evidence the gardener and the farm bailiff, both employed by the club, were entitled to come in and use the telephones connecting with the club house as and when they required to do so for the purpose of giving information or receiving instructions from the club house. The plaintiff, James Hemmings, had, as part of his duty, the duty of booking the times of entry and departure of the motors that entered the gate which was a short distance from the cottage, the gate being visible from a bow window which had been constructed apparently in such a way that the gate might be observed. The plaintiff, James Hemmings, or persons in his family, as part of their duty, had to issue tickets to the chauffeurs. It was his duty to receive telephonic communications from the club house, and communicate them to the various chauffeurs in order that they might take their motors to the club house to meet their employers there, and in the same way he had to attend to the telephone which connected with the head caddy master's premises adjoining the club house for the purpose of communicating to the caddies, who were in a shed near the cottage in question, the orders for their attendance that came from the club house. In carrying out those duties, especially the duties ot receiving telephonic messages from the club house in connection with the chauffeurs, it was necessary that he should be prepared to receive and communicate messages received in that way as late sometimes as eleven o'clock or half-past eleven at night, when the employers, the masters of the chauffeurs, happened to be dining at the club and did not return to their homes at an earlier hour. It was also his duty to provide, either by means of his wife or some other person employed by him, refreshments for the chauffeurs who collected in the chauffeurs' room, which adjoined the cottage, James Hemmings receiving the benefit of any payments that were made by the chauffeurs. On these facts the learned judge came to the conclusion that the occupation by Hemmings of the cottage was by virtue of his service as a servant, and not as a tenant.

In June, 1918, Hemmings was required by the local military tribunal to do farm work as a condition of exemption from military service. He approached the defendant Jackson, who referred him to the farm bailiff of the defendant company. The farm bailiff rejected him, and in the end he entered the service of a farmer in the neighbourhood named Bailey. The defendant Jackson tried to obtain for Hemmings a position which would carry with it the occupation of a cottage. Three such positions were offered to and refused by Hemmings. By this time, early in June, he had left the employment of the defendant company, and, inasmuch as the house was required for the occupation of a man whom the defendant Jackson had engaged, notice to quit was given to Hemmings. He had difficulty in obtaining the requisite accommodation, and declined to move until he could do so. Failing to induce the plaintiffs to move, the defendant company, by the defendant Jackson, the governing director, determined to eject them. Accordingly the defendant Jackson gave directions to an estate agent named Irons to take the necessary steps for turning out the plaintiffs and their belongings if they would not go before such a date as Mr. Irons might reasonably appoint. Mr. Irons approached the plaintiffs with a view to their going, intimating that he had instructions for the purpose of moving them, but his communication with them was without avail. Thereupon on August 2 Mr. Irons, with four men whom he had employed, one being a contractor and the other three the contractor's servants, went to the cottage in question. A police constable, who had received instructions from his superior officer, also attended with a view to preventing, as far as possible, a breach of the peace, and Mr. Jackson, junior, also attended, more as a spectator than anything else. Mr. Irons knocked at the door. It was opened by Mrs. Hemmings. There was a conversation and Mr. Irons crossed the threshold and entered the house. He inquired whether Mrs. Hemmings was prepared to turn out and she said "No"; whereupon he called in his men, and they proceeded to remove the furniture. The plaintiff, James Hemmings, then appeared on the scene, having been sent for. The plaintiffs refused to go; they protested against the removal of their furniture; their furniture was in fact turned out and James Hemmings was either led or gently pushed out as he refused to go himself. Mrs. Hemmings was the last to leave, and she left involuntarily. She was seated in a chair with a baby in her arms. She refused to move, and intimated that if she was to go out she would have to be carried out. Whereupon Mr. Irons and another man who was present raised the chair and carried it to the threshold. There Mrs. Hemmings handed the baby to her husband and, still sitting in the chair, she was then carried across the threshold and deposited outside.

The furniture was put into the garage. Some rain fell while this was being done. The garage was not completely walled in and rain did to a certain extent reach the furniture. At about two o'clock it rained heavily, and during this heavy fall the removal of the furniture was discontinued.

The learned judge came to the conclusion that no force was used beyond what was necessary for the purpose of ejecting the plaintiffs. He felt himself bound (against his own opinion) by *Newton* v. *Harland* (1) and *Beddall* v. *Maitland* (2) to give judgment for the plaintiffs, which he accordingly did, assessing the damages at twenty guineas.

The defendants appealed.

Barrington-Ward K.C. and *du Parcq* for the appellants. The appellants admit that they made a forcible entry into the house. The learned judge has found (1.) that no more force was used than was necessary to eject the respondents:

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(1) 1 Sc. N. R. 474; 1 Man. & G. 644.

(2) 17 Ch. D. 174.

(2.) that the respondents occupied the house merely as servants. On these facts

1. There was no entry within the meaning of the statute 5 Ric. 2, ssat. 1, c. 7. (1) The house was in the possession of the appellants. The possession of the servant or bailiff is the possession of the master: Pollock and Wright on Possession (2); and "A man who breaks open the doors of his own dwelling-house, or of a castle, which is his own inheritance, but forcibly detained from him by one who claims the bare custody of it, cannot be guilty of a forcible entry or detainer within the statutes": Bacon's Abridgement, Forcible Entry (D); Hawkins' Pleas of the Crown (3); *Lady Russell's Case* (4); Stephen's Digest of the Criminal Law, art. 84. (5) The position of the respondents would be no better if they were tenants at will or at sufferance: *Reg.* v. *Depuke.* (6)

[Scrutton L.J. That is doubted by Hawkins. (7)]

There is a considerable body of authority for holding that on an indictment for forcible entry the prosecutor must allege and prove a title to the land and tenements. But, however that may be—

2. In an action for forcible entry the title of the defendant was decisive. If he had a right to enter; if, in the wording of the earlier cases, the defendant's entry was congeable, no action lay against him even though the entry was forcible: Year Book of Hen. 6 (8); Year Book of Hen. 7 (9); Fitzherbert, L'Office de Justices (10); Dalton, Country

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(1) 5 Ric. 2 (1381), stat. 1, c. 7: "And also the King defendeth, that none from henceforth make any entry into any lands and tenements, but in case where entry is given by the law; and in such case not with strong hand, nor with multitude of people, but only in peaceable and easy manner. And if any man from henceforth do to the contrary, and thereof be duly convict, he shall be punished by imprisonment of his body, and thereof ransomed at the King's will."

(2) P. 58.

(3) 7th ed. (Leach), vol. ii., p. 38; 8th ed. (Curwood), vol. i., p. 503.

(4) (1606) Moore, 786.

(5) 5th ed. (1894), p. 61.

(6) (1710) 11 Mod. 273.

(7) 7th ed. (Leach), vol. ii., p. 38; 8th ed. (Curwood), vol. i., p. 504.

(8) (1431) Trin., 9 Hen. 6, f. 19, pl. 12.

(9) (1502) Hil. 15 Hen. 7, f. 17, pl. 12.

(10) (1606) p. 68.

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HEMMINGS AND WIFE v. STOKE POGES GOLF CLUB.

Justice (1); *Taunton* v. *Costar* (2); *Turner* v. *Meymott* (3); Hawkins on Pleas of the Crown (4); Co. Litt. (5)

It is clear law that a landowner in possession may exert the necessary force to expel a trespasser. If being out of possession he enters upon his land peaceably, he becomes owner in lawful and actual possession. An intruder cannot treat him as a trespasser: *Taunton* v. *Costar* (2); *Butcher* v. *Butcher* (6); *Jones* v. *Chapman*. (7). If he enters forcibly his entry may be punishable under the statute 5 Ric. 2, stat. 1, c. 7, but as against the intruder it has the same effect as if it was peaceable: *Harvey* v. *Brydges* (8); *Lows* v. *Telford* (9); 1 Smith's Leading Cases (10); Pollock on Torts (11); Foà on Landlord and Tenant (12); Archbold's Criminal Pleadings. (13) It would seem to follow that, having recovered possession by an entry which was not actionable, he may in this case also expel the trespasser if he use no more than necessary force. But the Court of Common Pleas held otherwise in *Newton* v. *Harland*. (14) It was there held by Tindal C.J. and Bosanquet and Erskine JJ. (Coltman J. dissenting) that where a tenant holds over after his term has expired the landlord must bring an action in order to regain possession, and is guilty of assault if he expels the tenant by force. That case was wrongly decided and ought to be overruled. It is inconsistent with the earlier cases which decided that an entry upon land in pursuance of a right to enter is not actionable even though it is forcible, and with the later cases of *Browne* v. *Dawson* (15), *Pollen* v. *Brewer* (16), and *Lake* v. *Campbell*. (17) It was decided against the view of Parke B.

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(1) (1635) p. 193.
(2) (1797) 7 T. R. 431.
(3) (1823) 1 Bing. 158.
(4) 7th ed. (Leach), vol. ii., p. 29; 8th ed. (Curwood), vol. i., p. 495.
(5) 19th ed. (1832), p. 257*a*, note 1.
(6) (1827) 7 B. & C. 399.
(7) (1849) 2 Ex. 803.
(8) (1845) 14 M. & W. 437.
(9) (1876) 1 App. Cas. 414, 426.
(10) 12th ed. (1915), p. 154.
(11) 10th ed., pp. 402 et seq.
(12) 5th ed. (1914), pp. 741, 742.
(13) 25th ed. (1918), p. 1174.
(14) 1 Sc. N. R. 474; 1 Man. & G. 644.
(15) (1840) 12 A. & E. 624.
(16) (1859) 7 C. B. (N. S.) 371.
(17) (1862) 5 L. T. 582.

and Alderson B. before whom successively the case was tried. These two learned judges repeated their dissent from it in *Harvey* v. *Brydges*. (1) The ratio decidendi of *Newton* v. *Harland* (2) was held to be inapplicable where the person expelled complains of a trespass to land: *Blades* v. *Higgs*. (3) It is believed that the almost universal opinion of the profession was in accordance with the opinion of Coltman J. who dissented from the majority of the Court in *Newton* v. *Harland*. (4)

[SCRUTTON L.J. referred to Cole on Ejectment. (5)]

The decision of the Court was doubted by Palles C.B. in *Beattie* v. *Mair* (6), and the opinions of Parke B. and Alderson B. were apparently approved by Lord Selborne in *Lows* v. *Telford*. (7) The decision has been followed in *Beddall* v. *Maitland* (8) by Fry J., who stated the law to be that if a trespasser has gained possession the rightful owner cannot use force to put him out, but must appeal to the law for assistance. In *Edwick* v. *Hawkes* (9) that learned judge followed his former decision. But this statement of the law was not accepted by Kay J., who, in *Scott* v. *Matthew Brown & Co.* (10) held that where a trespasser is in possession the owner entitled to possession may use such force as is necessary to eject him and short of doing him personal injury. *Newton* v. *Harland* (2), *Beddall* v. *Maitland* (8), and *Edwick* v. *Hawkes* (9) rest on the fallacy that because an act is forbidden it is therefore ineffectual.

[*Rex* v. *Westly* (11), *Allen* v. *England* (12), and *Jones* v. *Foley* (13) were also cited.]

Hon. S. O. Henn Collins for the respondent. Upon the first point, the possession of the respondent, James Hemmings, was not that of a servant. His service had determined, and he was holding over adversely to the appellants in the belief that he had a right to do so under the Courts (Emergency Powers) Act, 1914. It is admitted that the entry was forcible; and so the question whether *Newton* v. *Harland* (1) is good law is directly raised.

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(1) (1845) 14 M. & W. 437.

(2) 1 Sc. N. R. 474; Man. & G. 644.

(3) (1861) 10 C. B. (N. S.) 713.

(4) 1 Sc. N. R. 474; 1 Man. & G. 644. See 1 Sm. L. C., 4th ed. (1856), notes to *Taylor* v. *Cole*, p. 110; 12th ed. (1915), notes to *Six Carpenters' Case*, p. 155.

(5) Ch. 74, pp. 685 et seq.

(6) (1882) 10 L. R. Ir. 208.

(7) (1876) 1 App. Cas. 414, 426.

(8) 17 Ch. D. 174.

(9) 18 Ch. D. 199.

(10) (1884) 51 L. T. 746.

(11) (1669) 2 Keb. 495.

(12) (1862) 3 F. & F. 49.

(13) [1891] 1 Q. B. 730.

That case rests on the principle that an entry which is forbidden by law is not a lawful entry. Entry upon a person in possession is prima facie a trespass; it calls for a justification. If the defendant is entitled to possession and enters peaceably he can say that he entered prout ei bene licuit, and did no more; and that is a justification. But if he enters forcibly he cannot say he entered prout ei bene licuit, because his entry was illicit. *Newton* v. *Harland* (1) was not the first case to establish this principle. In *Taylor* v. *Cole* (2) Lord Kenyon C.J. said: "The question is whether a person, having a right of possession, may not peaceably assert it, if he do not transgress the laws of his country. I think he may; for a person, who has a right of entry, may enter peaceably, and being in possession may retain it, and plead that it is his soil and freehold. And this will not break in upon any rule of law respecting the mode of obtaining the possession of lands." Ashhurst J. in the same case said (3): "No person, who has a right of entry into lands, can be considered as a trespasser for asserting that right, unless it be attended with such acts of violence, as will subject him to a criminal prosecution," implying that the person entering does become a trespasser if his entry is attended with such acts of violence. *Newton* v. *Harland* (1) expressed what was implied by Ashhurst J. That case, and the adverse comments of Parke B. and Alderson B. in *Harvey* v. *Brydges* (4), came before the Court of Queen's Bench in *Davison* v. *Wilson* (5), where the question was whether, in a declaration in trespass to land, an allegation that the defendant entered with a strong hand and against the form of the statute was matter of substance or merely of aggravation. The plea was a right of entry. It would have been easy to say that the plea was a good answer even assuming the allegation to be matter of substance; but the Court declined to give that answer. *Beddall* v. *Maitland* (1) and *Edwick* v. *Hawkes* (2) reaffirmed the principle of *Newton* v. *Harland*. (3) That principle is sound and ought to be upheld; for, even if it be conceded that a right to enter is a defence to an action for a forcible entry upon lands and tenements, it does not follow that it is a defence to an action for assault and battery upon the person in possession. A landlord may distrain under an invalid warrant and justify under a valid one; but a sheriff who arrests a man under an invalid writ cannot justify under a valid one. (4) And there is good reason for the difference; because a man's person is more sacred than his property, and trespass to the person is the more likely to provoke a breach of the peace. For this reason chattels in actual use are privileged from distress. The decision of the Court of Common Pleas in *Newton* v. *Harland* (3) is of very great weight. The case had been tried twice before that decision was given, and upon that decision it was tried a third time. It rests on grounds of reason and ought not to be overruled.

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(1) 1 Sc. N. R. 474; 1 Man. & G. 644.
(2) (1789) 3 T. R. 292, 295.
(3) Ibid. 296.
(4) 14 M. & W. 437.
(5) (1848) 11 Q. B. 890.

Barrington-Ward K.C. in reply.

Cur. adv. vult.

Nov. 21. The following written judgments were delivered.

BANKES L.J. The plaintiff Hemmings was in the employ of the Stoke Poges Golf Club. He and his wife occupied a cottage, the property of the golf club, in virtue of his employment as a servant, and not as tenant. In May, 1918, the plaintiff Hemmings left his employment to go and work for a neighbouring farmer. He worked for him during the week, and on Sundays he attended to some of his former duties for the golf club in looking after the caddies. On June 3 formal notice was given to the plaintiff and he was required to deliver up possession by the 11th. The time was apparently extended to give the plaintiffs an opportunity of finding another house, but on July 14 the plaintiff Hemmings was definitely informed that he could not be allowed to remain after the 22nd, and that if he did not leave before that date steps would be taken to put him out. The plaintiffs did not leave, and the defendants thereupon employed an estate agent in the neighbourhood to remove the plaintiffs and their furniture. The agent attended at the cottage on August 2 with three or four men. The plaintiffs did not actively resist, though they refused to leave voluntarily. The plaintiff Hemmings was either led or gently pushed out of the house, and, as his wife refused to leave the chair in which she was seated, she was carried in the chair and deposited outside. The furniture was then taken out of the house and placed in the adjoining garage. The learned judge who tried the action has found that no unnecessary force was used, and none beyond what was necessary for the purpose of ejecting the plaintiffs. He also found that no appreciable damage was done to the furniture and none beyond what was necessarily incidental to a removal under the circumstances under which it was removed. The plaintiffs never at any time set up any right or title to remain in the cottage, but the plaintiff Hemmings merely intimated that he did not intend to comply with the notice to quit until he could find some other cottage to suit him.

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(1) 17 Ch. D. 174.

(2) 18 Ch. D. 199.

(3) 1 Sc. N. R. 474; 1 Man. & G. 644.

(4) See this point discussed in *Hooper* v. *Lane* (1857) 6 H. L. C. 443.

The action was brought to recover damages for forcible entry and for assault founded upon an alleged infringement by the defendants of the statute 5 Ric. 2, stat. 1, c. 7, which enacts that a forcible entry is a punishable offence. The learned judge found the facts as I have stated them. He gave judgment for the plaintiffs for 21*l*. damages. He indicated that had he not considered himself bound by authority he would have held that the action was not maintainable. The authority to which the learned judge referred is open to review by this Court. In the Court below, and in this Court, the defendants' counsel stated that they were willing that the case should be dealt with upon the footing that the entry made upon the cottage by their instructions was a forcible entry within the meaning of the statute of Richard II.

Under these circumstances this Court must, I think, deal with the appeal upon that footing, but the decision must not be taken to imply concurrence with the view accepted on behalf of the defendants. The question has not been argued or considered, and I express no opinion upon it except to indicate that in considering what may amount to a forcible entry a distinction has apparently always and very naturally been drawn between the case of a person who occupies premises by virtue of his employment as a servant, and the case of a person who occupies as a tenant: see *Lady Russell's Case* (1); Bacon's Abridgement, Forcible Entry (D) (2); Stephen's Digest of the Criminal Law, Forcible Entry. (3) There appears to have been quite a remarkable difference of judicial opinion dating from very early times as to the effect of the statutes against forcible entry, both on the question of what constitutes a punishable offence under the statutes and on the question whether any and if so what civil remedy exists for the person forcibly evicted. It is not necessary for the purpose of the present appeal to say anything or to come to any conclusion in reference to criminal proceedings. In reference to civil proceedings it is, I think, useful to consider the question in the first instance apart from the authorities upon which the learned judge rested his judgment. If the action lies at all it must be because of the admitted failure on the part of the defendants to observe the duty laid upon them by the statute of Richard II. The grounds upon which an individual can maintain an action for damages for breach by some other person of a statutory duty are well established. Lord Campbell cites the older authorities in his judgment in *Couch* v. *Steel* (4): "The general rule is that, 'where a man has a temporal loss, or damage by the wrong of another, he may have an action upon the case, to be repaired in damages': Comyns' Digest,

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(1) Moore, 786.

(2) 7th ed. (1832), vol. iii., p. 719.

(3) Art. 84, 5th ed. (1894), p. 61.

(4) (1854) 3 E. & B. 402, 411.

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Bankes L.J.

Action upon the Case (A). The statute of Westminster 2 (1 stat. 13 Edw. 1, c. 50) gives a remedy by action on the case to all who are aggrieved by the neglect of any duty created by statute: see 2nd Institute, 486.'" In *Butler* v. *Fife Coal Co.* (1) Lord Kinnear after discussing the terms of the statute which was under consideration in that case says: "If the duty be established, I do not think there is any serious question as to the civil liability;" and in a later passage on the same page he lays down the rule in these words: "But when a duty of this kind is imposed for the benefit of particular persons, there arises at common law a correlative right in those persons who may be injured by its contravention."

It is not however every prohibition which is imposed by statute which can be said to impose a duty for the benefit of any particular class or classes of persons, though the observance of the statute may be in the interest of the community in general or of some particular section of the community. *Stevens* v. *Jeacocke* (2) is perhaps the authority which is most often cited in support of this proposition, and Lord Campbell C.J. in his judgment in *Couch* v. *Steel* (3) points out the distinction between that case and the case he was dealing with. He says: "The case of *Stevens* v. *Jeacocke* (2) is clearly distinguishable from the present: no duty was, by the statute in that case, imposed upon the defendant: he was only prohibited under a penalty from exercising the right of fishing to the extent he had it at the common law. He was not bound to perform any particular duty created by the Act, but to forbear to do that which but for the Act he might have done." The case of *Gorris* v. *Scott* (4) may usefully be referred to in this connection as an instance where the breach of a statute creating a duty was held not to give the individual complaining any right of action. The headnote sufficiently explains the decision for the present purpose. I cannot find that it has ever been suggested that the statute of Richard II. is a statute imposing

(1) [1912] A. C. 149, 165.
(2) (1848) 11 Q. B. 731.
(3) 3 E. & B. 402, 413.
(4) (1874) L. R. 9 Ex. 125.

any duty upon any one in favour of the person complaining of a forcible entry upon land or tenement. In its terms it does not purport to create any such duty, and from the nature of things it could not be expected to do so—otherwise it would in effect be conferring some kind of title upon persons who, like the plaintiffs in the present case, were not setting up any title and were in truth mere trespassers.

This view of the effect of the statute is accepted by Erskine J. in *Newton* v. *Harland* (1), where he refers to the early authorities and says: "There are, it is true, many cases (some of which were cited at the argument) in which it has been held that no action for trespass quare clausum fregit will lie at the suit of a tenant against the landlord for a forcible entry after the expiration of the term. The earlier authorities upon this point are collected in Dalton's Justice, c. 129, p. 431; and the same doctrine is clearly established by the cases of *Taylor* v. *Cole* (2); *Taunton* v. *Costar* (3); *Argent* v. *Durrant* (4); and *Turner* v. *Meymott.* (5) But then the reason for this is also given, namely, that the plaintiff, having no title to the possession as against his landlord, can have no right of action against him as a trespasser, for entering upon his own land, even with force; for, although the law had been violated by the defendant, for which he was liable to be punished under a criminal prosecution, no right of the plaintiff had been infringed, and no injury had been sustained by him for which he could be entitled to compensation in damages;" and by Fry J. in *Beddall* v. *Maitland* (6), where he says: "He can recover no damages for the entry, because the possession was not legally his, and he can recover none for the force used in the entry, because, though the statute of Richard II. creates a crime, it gives no civil remedy."

It seems material next to consider what acts or classes of acts fall within the mischief of the statutes relating to forcible entry and are covered by their provisions. These will be found collected in Russell on Crimes (1), and for the present purpose it is only material to notice the following. The entry may be forcible not only in respect of violence done to the person of a man, as by beating him if he refuses to relinquish his possession; but also in respect to any other violence in the manner of entry, as by breaking open the doors of a house, and perhaps also by an act of outrage after the entry, as by carrying away the party's goods. Bacon's Abridgement, title Forcible Entry (B), states the law thus: "If a man enters peaceably into an house, but turns the party out of possession by force, or by threats frights him out of possession, this is a forcible entry." In Viner's Abridgement (2) the law is stated thus: "If one enters peaceably, and when he is come in, useth violence; this is a forcible entry."

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(1) 1 Sc. N. R. 474, 497; 1 M. & G. 644, 666.

(2) 3 T. R. 292.

(3) 7 T. R. 431.

(4) (1799) 8 T. R. 403.

(5) 1 Bing. 158; 7 Moo. 574.

(6) 17 Ch. D. 174, 188.

All the acts complained of by the plaintiffs in this action are therefore covered by the statute upon the assumption that the entry by the defendants was a forcible entry within the statute. It would seem therefore that if the plaintiffs have no remedy at common law for any breach or breaches of the statute their action must fail. The learned judge in the Court below decided in the plaintiffs' favour upon the authority of certain decisions which it therefore becomes necessary to examine. Those decisions, I think, proceed upon the view of the law that a person who assaults another, however trivial that assault may be, must justify his action or be liable at common law to pay damages, and that, although an assault where no more force is used than is necessary may be justified where it is in defence of property, it cannot be justified if the possession, in defence of which the assault is committed, has been obtained by means of a forcible entry.

This certainly was the view of the majority of the Court in *Newton* v. *Harland*. (3) The action there was for an assault. The defendants pleaded first Not Guilty, and, for a second plea, that "in defence of the possession of his said dwelling-house" the defendant Harland and his servant by his command "gently laid their hands upon" the plaintiff's wife "in order to remove, and did then remove" her . . . . "as they lawfully might for the cause aforesaid." From the evidence given at the first trial before Parke B. it appeared that the defendants had probably been guilty of a forcible entry upon the premises in question, and that it was after possession had been obtained by that means that the alleged assault was committed. The case had a curious career. Parke B. directed the jury to find for the defendants on the ground that the second plea was proved. A rule was obtained on the ground of misdirection. The rule was made absolute and a new trial ordered by a Court consisting of Tindal C.J., Park J., Bosanquet J. and Coltman J. No very definite opinion was expressed by any of the members of the Court upon the main point argued, and Coltman J. expressly refrained from expressing any opinion upon it. The new trial was ordered in order that the facts as to the time and manner of the entry might be more precisely ascertained. The case was tried the second time by Alderson B., who took the same view as Parke B. had done, and so directed the jury. A second rule was obtained on the ground of misdirection which was argued before Tindal C.J. and Vaughan, Coltman and Erskine JJ. The Court took time to consider its judgment and subsequently, Vaughan J. dying and the opinion of Coltman J. differing from that of the Lord Chief Justice and Erskine J., the Court desired that the case might be reargued. This was accordingly done before Tindal C.J. and Bosanquet, Coltman and Erskine JJ. The majority of the Court held that there had been a misdirection, and a new trial was ordered. Coltman J. was the dissenting judge. The case was tried a third time, and on this occasion by Coltman J., who felt bound to direct the jury in accordance with the decision of the Court of Common Pleas. The matter came before the Court again on a rule to show cause why the postea should not be amended, but this rule was refused, and the litigation was then abandoned and a bill of exceptions was not proceeded with.

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(1) 7th ed. (1909), p. 447.

(2) Vol. xiii., p. 380.

(3) 1 Sc. N. R. 474; 1 Man. & G. 644.

Although the decision of the point of law is that of the majority of the Court upon making absolute the rule for the second new trial, the fact is that the opinions of the judges who actually dealt with the point, either upon the trial of the action or in banc, were equally divided, Tindal C.J. and Bosanquet and Erskine JJ. holding one view, and Parke B., Alderson B. and Coltman J. holding the other. The decision was given in the year 1840, and though the case has never been expressly overruled it has been treated to a chorus of disapproval both from judges and from text writers. In *Harvey* v. *Brydges* (1) Parke B. and Alderson B. repeated their already expressed views and Platt B. concurred. In *Blades* v. *Higgs* (2) Erle C.J. in delivering the judgment of the Court, treated the case of *Harvey* v. *Brydges* (1) as overruling *Newton* v. *Harland*. (3) Lord Selborne in *Lows* v. *Telford* (4) accepts the authority of *Harvey* v. *Brydges*. (1) Palles C.B. in *Beattie* v. *Mair* (5) obviously disagrees with the decision of the majority of the Court in *Newton* v. *Harland*. (3) Among the text writers, Mr. Cole in his work on Ejectment, the successive editors of Smith's Leading Cases, and Sir F. Pollock in his work on Torts may be mentioned as questioning the authority of *Newton* v. *Harland*. (3) So far as reported cases are concerned I cannot find that *Newton* v. *Harland* (3) was accepted and acted upon as good law until the year 1880 and again in 1881, when Fry J. in the two cases of *Beddall* v. *Maitland* (6) and *Edwick* v. *Hawkes* (7) accepted that decision as settling the law on the point. Speaking for myself I consider that the view of the law expressed by Coltman J. in his minority judgment in *Newton* v. *Harland* (3) is the correct one. I think that the view he takes is entirely confirmed by Lord Selborne's comment on *Harvey* v. *Brydges* (1) in *Lows* v. *Telford* (4), where he expresses his concurrence with the view of the law that, so far as relates to the fact of possession and its legal consequences, it makes no difference whether it has been taken by the legal owner forcibly or not. In *Beddall* v. *Maitland* (1) Fry J. admits that a plaintiff in the position of the plaintiffs in the present action can recover no damages for the entry, for the possession was not legally his, and he can recover none for the force used in the entry because, though the statute of Richard II. creates a crime, it gives no civil remedy. He however then goes on to speak of any force used to eject the plaintiff in that action as an "independent wrongful act" though not in excess of what the occasion required to expel the plaintiff, and he gives as his reason that the person using the force cannot allege that the acts were lawful unless justified by a lawful entry; and he cannot plead that he has a lawful possession. I am unable to agree with the view thus expressed by the learned judge. In the present case the defendants were undoubtedly entitled to possession of the cottage. The plaintiffs had no right and did not pretend they had any right to remain there. Assuming, but without deciding, that the entry by the defendants was a forcible entry, the right to possession was in the defendants, and the acts which are alleged as giving the plaintiffs a right of action were done in defence of their right to possession: *Blades* v. *Higgs* (2); and of the possession which they had acquired by the alleged forcible entry. I have no fear that the present decision will encourage lawlessness as was suggested for the respondent. A person who makes a forcible entry upon lands and tenements renders himself liable to punishment, and he exposes himself also to the civil liability to pay damages in the event of more force being used than was necessary to remove the occupant of the premises, or in the event of any want of proper care in the removal of his goods. If the view of the law expressed in *Newton* v. *Harland* (3) is correct it must follow that the law confers upon the lawless trespasser a right of occupancy the length of which is determined only by the law's delay. For the reasons I have stated I do not believe that this is a true view of the law, and I think that

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(1) 14 M. & W. 437.

(2) 10 C. B. (N. S.) 713, 721.

(3) 1 Sc. N. R. 474; 1 Man. & G. 644.

(4) 1 App. Cas. 414, 426.

(5) 10 L. R. Ir. 208.

(6) 17 Ch. D. 174.

(7) 18 Ch. D. 199.

(1) 17 Ch. D. 174.

(2) 10 C. B. (N. S.) 713.

(3) 1 Sc. N. R. 474; 1 Man. & G. 644.

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Bankes L.J.

this Court should say definitely that they do not agree with the view of the majority of the Court in *Newton* v. *Harland* (1) or with the decisions of Fry J. in *Beddall* v. *Maitland* (2) and *Edwick* v. *Hawkes*. (3) In my opinion the appeal must be allowed with costs and the judgment entered for the plaintiffs must be set aside and judgment entered for the defendants with costs.

SCRUTTON L.J. This case raises a legal question of great interest and general importance. Shortly stated the question is whether, if an owner of landed property finds a trespasser on his premises, he may enter the premises and turn the trespasser out, using no more force than is necessary to expel him, without having to pay damages for the force used. So stated common honesty and common sense would answer "Of course he may." To answer the question at law takes us to a statute of Richard II. and a number of conflicting legal decisions.

I accept and refer to the very careful statement of facts by the judge below. Briefly, Mr. Hemmings was a servant of the Stoke Poges Golf Club, managed by Mr. Jackson. As such servant, and to do his work as a servant, he occupied as part of his wages one of the club's cottages, used partly for the work of the club in connection with caddies, chauffeurs and telephones. His service with the club was terminated, and the local tribunal, in excusing him from military service required him to do work of national importance on a farm. He got such work, but continued to live in the club's cottage, as he had difficulty in getting another cottage. The club allowed him to stay for some little time and then required him to leave. He still stayed on. Accordingly the club through Mr. Jackson sent people to take possession. They entered without any disturbance or violence. Mr. and Mrs. Hemmings declined to leave. Thereupon they carried Mrs. Hemmings out sitting in a chair. They led Mr. Hemmings out. They carried the furniture out and put it in a garage with one side open to the weather. The weather was showery, and part of the furniture was wet. All these operations were carried out with no more force than was necessary to remove people who did not actively resist but declined to go unless carried.

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(1) 1 Sc. N. R. 474; 1 Man. & G. 644.

(2) 17 Ch. D. 174.

(3) 18 Ch. D. 199.

Mr. and Mrs. Hemmings then brought an action for "trespass, assault and battery." They alleged no right in themselves except that they were in possession of a house which they alleged the defendants "with strong hand and multitude of people" broke and entered, and assaulted and ejected them and their property.

The judge below, against his own view but following *Beddall* v. *Maitland* (1), a decision of Fry J., which in turn accepted as law a decision of the Court of Common Pleas in 1840 in *Newton* v. *Harland* (2), gave no damages "for the actual eviction," but gave twenty guineas damages for the assaults on Mr. and Mrs. Hemmings and the damage to the furniture. As these assaults appear to constitute "the actual eviction," the judge finding that no force was used beyond that which was actually necessary for the purpose of ejecting the plaintiffs, the distinction is difficult to grasp. *Newton* v. *Harland* (2) is a much criticized case. It was tried three times, and the three trial judges, Parke B., Alderson B. and Coltman J., all differed from the decision of the three judges of the Common Pleas, Tindal C.J., Bosanquet J. and Erskine J., who against the view of Coltman J. gave the majority decision of the Court in banc. The Court of Exchequer in *Harvey* v. *Brydges* (3) in the year 1845 expressed, though obiter, a strong opinion against the decision. The Court of Common Pleas, again obiter, Erle C.J. presiding, in *Blades* v. *Higgs* (4), treated *Newton* v. *Harland* (2) as overruled by *Harvey* v. *Brydges* (3), though it seems it was inaccurate in any strict sense to say the case was overruled. When Sir James Shaw Willes edited the fourth edition of Smith's Leading Cases in 1856 he inserted as a note to *Taylor*

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(1) 17 Ch. D. 174.

(2) 1 Sc. N. R. 474; 1 Man. & G. 644.

(3) 14 M. & W. 437.

(4) 10 C. B. (N. S.) 713.

v. *Cole* (1), his co-editor being Keating J., the passage "it is believed that the almost universal opinion of the profession has been in accordance with the doctrine of the principal case and the opinion of the very learned judge, Mr. Justice Coltman, who dissented from the majority of the Court in *Newton* v. *Harland*." (2) This note was allowed to stand by Lord Collins in the three editions he subsequently edited. (3) In 1881 however Fry J. in *Beddall* v. *Maitland* (4) treated *Newton* v. *Harland* (2) as good law, and in *Edwick* v. *Hawkes* (5) in the same year repeated his approval. In 1882 Palles C.B. in *Beattie* v. *Mair* (6), after having *Newton* v. *Harland* (2) and the decisions of Fry J. cited to him, reserved liberty to consider whether *Newton* v. *Harland* (2) was good law. Text writers have also taken a very unfavourable view of *Newton* v. *Harland*. (2) Cole on Ejectment in 1857 treated it as "in effect overruled." Sir F. Pollock on Torts (7) incidentally takes the view that *Newton* v. *Harland* (2) was not reconcilable with the old decisions, and doubts whether Fry J.'s position is correct. Mr. Foà on Landlord and Tenant (8) treats *Newton* v. *Harland* (2) as incorrectly decided. The last edition of Woodfall (9) speaks of *Newton* v. *Harland* (2) as repeatedly questioned though never formally overruled. A case which is doubted by Parke B., Sir James Shaw Willes, Lord Collins and Palles C.B. has, in spite of eighty years' existence without being overruled, to justify its existence; and the hearing of this case appears to be the first time that a Court having power to overrule it has had to consider it. The first question is what *Newton* v. *Harland* (2) decided and on what grounds, and to what extent Fry J. approved it. The second, whether it was in accordance with the law when it was decided, and why so many eminent authorities have disapproved of it. Newton was a tenant for six months of rooms in a house occupied by Harland. The six months

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(1) 3 T. R. 292.

(2) 1 Sc. N. R. 474; 1 Man. & G. 644.

(3) The note reappears in substance in every subsequent edition. See the 12th ed. (1915), vol. i., p. 155.

(4) 17 Ch. D. 174.

(5) 18 Ch. D. 199.

(6) 10 L. R. Ir. 208.

(7) 10th ed. (1916), p. 404.

(8) 5th ed. (1914), p. 742.

(9) 19th ed. (1912), p. 857.

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expired, and, no rent having been paid, Harland first broke open the door to distrain for rent, and then with four or five other persons entered the apartment and forcibly expelled Newton's family. Parke B., on the first trial, held that this gave no cause of action. The Court of Common Pleas sent the case down to ascertain the circumstances of the entry. Alderson B. at the second trial held that the landlord was entitled to use reasonable force to expel a tenant who would not quit on the expiration of his term. The Court of Common Pleas by three judges to one held that if there was force enough to make a forcible entry, the fact that it was no more than reasonable was no defence, as forcible entry was criminal by a statute, and no possession gained by an illegal act could be lawful, or the ground for ejecting another person. They therefore ordered the case to be retried to see whether there was a forcible entry as distinct from mere trespass vi et armis, and at the third trial the jury found there had been a forcible entry, whereupon the defendant gave up the contest, and the plaintiff, who got as the result of the triple struggle forty shillings damages and forty shillings costs, was probably not at all contented with the result. The majority judges appear to have agreed that Newton could not bring trespass if dispossessed with only necessary force, because he had no right of possession against his landlord; but that an action of assault would lie even if the assault was justified as protecting Harland's possession, because that possession, being obtained by a criminal act was unlawful, and could not authorize an assault to protect it.

In *Beddall* v. *Maitland* (1) Beddall employed Maitland as a manager of his nursery garden and allowed him to occupy a house on the premises in exclusive possession. Beddall claimed to terminate the service; Maitland alleged he was a partner. The judge found Maitland was in possession as a wrongdoer, when a forcible entry was made on him and he was ejected. He claimed damages. Fry J. said (2): "The result of the cases appears to me to be this, that, inasmuch as the possession of the defendant was unlawful, he

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(1) 17 Ch. D. 174.
(2) 17 Ch. D. 188.

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can recover no damages for the forcible entry of the plaintiff. He can recover no damages for the entry, because the possession was not legally his, and he can recover none for the force used in the entry, because, though the statute of Richard II. creates a crime, it gives no civil remedy. But, in respect of independent wrongful acts which are done in the course of or after the forcible entry, a right of action does arise, because the person doing them cannot allege that the acts were lawful, unless justified by a lawful entry; and he cannot plead that he has a lawful possession." In *Edwick* v. *Hawkes* (1), which was a case of expulsion by violence after peaceable entry of a landlord, Fry J. repeated the views he had expressed in *Beddall* v. *Maitland* (2), and added, on the authority of Lambard's Eirenarcha, that the subsequent violence colours the original peaceable entry. Incidentally this appears to be contrary to the law as stated by Maule J. in *Jones* v. *Chapman* (3), that if a person has a right to possess, and enters peaceably, his actual possession plus his right outweighs the actual possession of the person on whom he enters, who becomes a trespasser, and can be expelled. It did not occur to Maule J. that the subsequent expulsion coloured the original entry, and made the possession obtained by it unlawful. Indeed in one old case (4) cited in Challis on Real Property (5), a person with a right to enter made entry and got seisin in deed by getting half through a window and being thrown out, and no judge took the view that he lost his seisin in deed because his struggles to avoid being thrown out coloured the original entry of half his body through the window, but he was given his assize, which depended on seisin in deed. The basis of these decisions appears to me to be that an assault on a trespasser on your possession by using reasonable force to expel him could not be justified if your entry and possession was criminal under the statutes of forcible entry. The early authorities are very difficult to follow, as there were several statutes against forcible entry, and various remedies under them, and the numerous abridgers frequently misunderstand the statute which provided the remedy to be enforced and the proceeding for enforcing it, and in addition give constant wrong references to the cases they are purporting to abstract. Sir James Stephen (1) states as to the criminal remedy: "It is immaterial whether the person making such an entry had or had not a right to enter, provided that a person who enters upon land or tenements of his own, but which are in the custody of his servant or bailiff, does not commit the offence of forcible entry." Incidentally this cottage had certainly been in the custody of Hemmings as servant until shortly before the entry, and I doubt very much whether his lingering on till he could find another cottage was sufficiently adverse possession to destroy his previous custody. If so, this element which was not present in *Newton* v. *Harland* (2) and *Beddall v. Maitland* (3) is enough to decide this case against the plaintiffs, if, as I have found, the only assault is the lawful using of reasonable force to remove him from the custody. And Stephen J. is only repeating as to the servant the decision of Popham C.J., Lord Coke, and Fleming C.B. in the Star Chamber in *Lady Russell's Case* (4), that forcible entry into a castle of which the Lady had the custody was not a riot, for the Count had the castle and the possession, and the Lady only the custody.

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(1) 18 Ch. D. 199.

(2) 17 Ch. D. 174.

(3) 2 Ex. 803, 821.

(4) (1334) 8 Ass., f. 17, pl. 25.

(5) 3rd ed. (1911), p. 236.

But though there is certainly authority that the magistrate on an inquisition of forcible entry does not inquire into title (the justice, says Dalton (5), ought to execute the statute 15 Rich. 2, "without any examining, questioning, or standing upon the right or title of either party"), yet there is a large amount of authority that on indictment the prosecutor must allege and prove his freehold title in proceedings on the earlier statutes or, in proceedings on the later statutes, a title mentioned in them such as a term of years. If he did not do so the indictment would be quashed or the charge fail. For instance in *Rex* v *Wannop* (1) the Court of King's Bench, including Sir Michael Foster, quashed an indictment for forcible entry which did not allege the estate of the person expelled. The Court says "it is absolutely necessary that this should appear. . . . . The 5 Rich. 2, c. 7, the 15 Rich. 2, c. 2, and the 8 Hen. 6, c. 9, do only extend to freehold estates; and the 21 Jac. 1, c. 15, does only extend to estates holden by tenants for years," etc. In conformity with this there are numerous statements that there cannot be a forcible entry by a landlord against a tenant at will or on sufferance. In *Rex* v. *Bathurst* (2) the Court quashed a count on the statute which did not show what estate the prosecutor had in the messuage, "for he might be only tenant at will, and if he were so, a forcible entry upon the messuage is not an offence against the statute." In *Reg.* v. *Taylor* (3), on a motion to quash an indictment for forcible entry which did not allege disseisin of the prosecutor, Lord Holt said: "The present case is upon the statute of Henry VI., upon which you must always allege a freehold and seisin in somebody; . . . . and of necessity there must be a disseisin of the freehold laid." If the prosecutor alleged a freehold and gave prima facie evidence of possession, it would be defeated by showing he had no freehold. And there are numerous cases to the same effect. In *Reg.* v. *Child* (4) at the Old Bailey and *Rex* v. *Williams* (5), where there are rulings to the contrary, none of the numerous reported cases on the subject appears to have been cited. If it were necessary to decide whether an indictment for forcible entry lay, where the prisoner had the freehold and the right to enter and the prosecutor was only a tenant at will, or on sufferance, or a trespasser, I should certainly require to look much further into the authorities before I answered in the affirmative. But I will assume that the criminal remedy would lie in such a case. It is still clear that in such

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(1) Digest of the Criminal Law, Art. 84, 5th ed. (1894), p. 61.

(2) 1 Sc. N. R. 474; 1 Man. & G. 644.

(3) 17 Ch. D. 174.

(4) Moore, 786.

(5) The Country Justice, ch. 22, ed. 1655, p. 64; ed. 1742, p. 96.

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(1) (1754) Say. 142.
(2) (1755) Say. 225.
(3) (1702) 7 Mod. 123.
(4) (1846) 2 Cox C. C. 102.
(5) (1829) 4 Man. & R. 471.

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a case a civil action would not lie to the person expelled. Lambard's Eirenarcha published in 1602 is a text-book of high authority for the country justice, and with Dalton's work already cited is the source of most of the extracts of which the abridgments are full. Though Lambard says (1), "I see no cause, why the Justice of Peace (who perhaps shal want sufficient learning in the law to discerne of the right, or title, and yet may be both a fit person to remove the force, and able enough to restore the possession) should be tied to the discussion of the right or title, of either of the parties," he continues, "And this I gather upon the opinion of all the Court (9 Hen. 6, 19) . . . . that the action upon the statute 8 Hen. 6 is for the right onely, and must alway say, Illicite ingressus est, or ubi ingressus non datur per legem: but the endictment is for the force in respect of the King, to whom the partie shall make fine, although his right be never so good, and sound." Dalton (2) puts the matter thus: "At this day, if a man doth enter into any lands or tenements by force, or multitude of people, when his entry is lawfull, hee is not punishable by action eyther at the common law, nor by action upon any statute; for where the title of the plaintiffe is not good, there hee hath no cause of action, although the defendant doth enter with force." The same law is to be found in three passages in Viner's Abridgement (3), which in their turn go back to Fitzherbert, Natura Brevium, 248 H, Brooke's Abridgment, Accion sur le Statute, pl. 7, and the Year Book of 9 Hen. 6. (4) A note to Coke upon Littleton puts it thus (5): "In case an action is brought on these statutes, if the defendant make himself a title, which is found for him, he shall be dismissed without any inquiry concerning the force; for howsoever he may be punishable at the King's suit, for doing what is prohibited by statute, as a contemner of the laws and disturber of the peace, yet he shall not be liable to pay any damages for it to the plaintiff, whose

(1) Ed. 1602, p. 139; ed. 1619, pp. 147–8.

(2) Country Justice, ed. 1635, p. 193.

(3) Forcible Entry, A. 13, P. 1, H. *a*, A. *a*. 1.

(4) (1431) Trin., 9 Hen. 6, folio 19, pl. 12.

(5) Co. Litt., 19th ed. (1832), p. 257 *a*, note 1.

injustice gave him the provocation in that manner to right himself." Hawkins' Pleas of the Crown (1) has the same statement. Fry J. prefers to put it thus in *Beddall* v. *Maitland* (2): "He" (the person expelled) "can recover no damages for the entry, because the possession was not legally his, and he can recover none for the force used in the entry, because, though the statute of Richard II. creates a crime, it gives no civil remedy." I think with respect that the learned judge has overlooked the facts, first, that though the statute of Richard II. did not in terms give a civil remedy, many actions were brought on it (see Brooke's Abridgment, Accion sur le Statute, and Viner Action A. *a.*); and secondly, that the statute 8 Hen. 6, s. 6, did give a civil action for forcible entry: and that it is with regard to the civil actions under both statutes that it is held that they do not lie if the defendant had a right of entry against the plaintiff. They do lie if he had no right of entry. It appears to follow that the right of entry when forcibly exercised was not made ineffective or civilly unlawful by the force. Ordinarily a criminal prohibition would give a right of action to any person specially injured by the prohibition. It does not in this case because against the person damaged the entry was not wrongful, but rightful, and he therefore suffered no special damage. The wrong was against the King. In *Newton* v. *Harland* (3) Erskine J. accepts the law as stated and gives reasons for it, but says that these reasons do not apply to an assault and removal of furniture, if they do to an entry or trespass. It seems to me that when the grievance complained of is the removal by no more force than is necessary of a trespasser and his property from premises which the landlord has a right to enter for that purpose, the justification covers not only the entry but the forcible expulsion which is the object of the entry, and which makes the entry a forcible one.

It follows that I agree with the view taken by Parke B.

(1) 7th ed. (Leach, 1795), vol. ii., p. 29; 8th ed. (Curwood, 1824), vol. i., p. 495.

(2) 17 Ch. D. 174, 188.

(3) 1 Sc. N. R. 474; 1 Man. & G. 644.

and Alderson B. in *Harvey* v. *Brydges* (1) and at the trials of *Newton* v. *Harland* (2), and think that *Newton* v. *Harland* (2) was wrongly decided in the Common Pleas, and *Beddall* v. *Maitland* (3) by Fry J. The case of *Scott* v. *Matthew Brown & Co.* (4), where Kay J. questioned *Beddall* v. *Maitland* (3), seems to me to have been rightly decided. Indeed the fact that while *Newton* v. *Harland* (2) was taken as preventing a person entitled to possession from using force to expel a trespasser, *Jones* v. *Foley* (5) allowed such a person to pull the roof down over the trespasser's head, showed that the law was in a ridiculous state, from which I hope our decision may release it.

It will still remain the law that a person who replies to a claim for trespass and assault that he ejected a trespasser on his property with no more force than was necessary may be successfully met by the reply that he used more force than was necessary if the jury can be induced to find it. The risk of paying damages and costs on this finding, and the danger of becoming liable to a prosecution under the statutes of forcible entry may well deter people from exercising this remedy except by order of the Court. But I see no reason to add to the existing privileges of trespassers on property which does not belong to them by allowing them to recover damages against the true owner entitled to possession who uses a reasonable amount of force to turn them out.

I am giving effect to the learned judge's own view in the Court below by allowing the appeal with costs here and below.

Duke L.J. On August 2, 1918, the plaintiffs were wrongfully in occupation of a cottage belonging to the defendant company. Mr. Hemmings had been in their service and lived in the cottage with his wife, his co-plaintiff, for purposes connected with his service. When the service came to an end the employers required to have the cottage vacated in order that it might be occupied by Mr. Hemmings' successor. Mr. Hemmings, however, could not find other quarters, and against the will of the company he and his wife remained in occupation. After a fortnight's interval the company sent a representative to call upon Mr. and Mrs. Hemmings to remove, and to remove them in case they should refuse to quit; the demand was made by the representative in company with other persons, and was refused, and the plaintiffs were gently removed. They offered only a passive resistance, and there was no act of violence; there was however a display of force in the presence of a posse of men who were ready to use force; there was a laying of hands upon each plaintiff which was in point of law an assault, and the plaintiffs' furniture was put out of the cottage and deposited under a neighbouring shed. The plaintiffs brought their action for the assault and the trespass to goods involved in these acts, and they have recovered judgment for twenty guineas damages and costs. Peterson J. deemed himself bound by the decision of the Court of Common Pleas in *Newton* v. *Harland* (1) and the judgment of Fry J. in *Beddall* v. *Maitland* (2) to give judgment for the plaintiffs, but, if he had not felt himself bound by these judgments, would have decided in favour of the defendants.

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(1) 14 M. & W. 437.

(2) 1 Sc. N. R. 474; 1 Man. & G. 644.

(3) 17 Ch. D. 174.

(4) 51 L. T. 746.

(5) [1891] 1 Q. B. 730.

The case for the plaintiffs was founded on the statutes relating to forcible entry upon lands and tenements. On their behalf it was contended that, although their occupation of the cottage was wrongful, they were possessed of it in fact; that although the defendant company was entitled to possession and had used no more force than was needful in ejecting the plaintiffs, the defendants by their agents had made what amounted in law to a forcible entry upon the cottage; and that, although the eviction itself gave the plaintiffs no cause of action, they could maintain an action for the successive incidents in it—namely, the putting of the defendants over the threshold and the removal of furniture. *Newton* v. *Harland* (1) and *Beddall* v. *Maitland* (2), although not precisely identical in point of fact with this case, contain statements of the law sufficient, if they are well founded, to entitle the plaintiffs to retain the judgment they have recovered. The gist of the matter is found in the judgment of Fry J. in *Beddall* v. *Maitland* (1), where he holds that the possession taken by the defendants was illegal by reason of the statutes against forcible entry and that by reason of this illegality the assaults upon the plaintiffs were wrongful acts and the removal of the furniture was wrongful. Some expressions of Lord Lyndhurst C.B. in *Hillary* v. *Gay* (2), the judgments already mentioned, and a judgment of Fry J. in *Edwick* v. *Hawkes* (3), are the authorities on which the plaintiffs' claim rests. The contention of the defendants upon the appeal was that these several decisions and opinions are inconsistent with the general tenor of the law of real property, unwarranted by the statutes on which they depend, and erroneous in principle. For the decision of the appeal some examination of the authorities on forcible entry earlier than *Newton* v. *Harland* (4) and of the law relating to possession is required.

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(1) 1 Sc. N. R. 474; 1 Man. & G. 644.

(2) 17 Ch. D. 174.

The first question in the case is whether there was a forcible entry. The successive statutes from Richard II. to James I. distinguish between forcible entry and forcible detainer; and there is a body of decisions as to each set of enactments. The distinction is in some respects material to the present inquiry. It was long ago judicially declared that a peaceable entry of the true owner followed by a forcible detainer of the premises from a previous disseisor gave no ground for indictment and no cause of action for recovery of possession. The early writers on forcible entry also laid emphasis on the fact that the force which is involved in such an entry as the statutes forbid is actual force. Fitzherbert J. deals with the matter in his treatise of the sixteenth century on Justices of the Peace (5), and Lambard in his Eirenarcha (6) enlarges upon Fitzherbert J.'s view. Force which is "rather intellectual than actual, and may therefore be termed a force in the consideration of law, which accounteth all that to be vis which is contrary to jus" . . . . is said not to be the kind of force aimed at by the statute. That, on the contrary, is force which is apparent by the act itself. Peterson J. says in his judgment in this case "I will assume that the entry was peaceable," and finds himself bound by the cases already mentioned to hold that even so the subsequent acts of the defendants were actionable wrongs. I should myself have been disposed to hold as matter of fact that the entry was peaceable. But Peterson J. did not expressly so hold, and the appellants were content to assume against themselves a finding to the contrary.

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(1) 17 Ch. D. 174.

(2) (1833) 6 C. & P. 284.

(3) 18 Ch. D. 199.

(4) 1 Ex. N. R. 474; 1 Man. & G. 644.

(5) L'Office de Justices de Peace, ed. 1606, pp. 68 et seq.

(6) Ed. 1619, p. 140.

Assuming a peaceable entry, was the subsequent expulsion of the plaintiffs wrongful and actionable? The opinion of Fitzherbert J. is stated in the treatise already mentioned in these terms (1): "Nul des dits estatutes extende ou home enter en peaceable maner, et apres cel detient oue force." Comyns C.B. deals with the subject in his Digest (2), and says this: "No writ of restitution shall be awarded . . . . where he, who used force, has the possession by operation of law: as, if a disseisee enters, and afterwards, by force, ousts his disseisor; the possession shall not be restored; for it was revested in the disseisee by his entry." Both these statements of the law are based upon ancient decisions recorded in the Year Books. In modern times the principle involved has often been considered in our Courts. The statement of Maule J. in *Jones* v. *Chapman* (3), which was affirmed as an accurate exposition of the law by Lord Selborne and Lord Cairns in *Lows* v. *Telford* (4), is in these terms: "As soon as a person is entitled to possession, and enters in the assertion of that possession, or, which is exactly the same thing, any other person enters by command of that lawful owner, so entitled to possession, the law immediately vests the actual possession in the person who has so entered." The rule of law as laid down in the old authorities and declared in *Jones* v. *Chapman* (1) appears to me to be fatal to the claim of the plaintiffs in this case if the defendants' actual entry upon the cottage was peaceable.

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(1) L'Office de Justices, Forcible Entrie, f. 68, s. 5.

(2) Com. Dig., Forceable Entry, D. 7.

(3) 2 Ex. 803, 821.

(4) 1 App. Cas. 414, 426.

The appellants, as I have said, accepted the burden of defending their proceedings upon the footing that there was a forcible entry as well as a forcible expulsion of the plaintiffs, and they justified themselves firstly upon the basis of the finding of Peterson J. that the male plaintiff held the cottage at the time of the events in question as a servant of the defendant company. They relied upon passages in Hawkins' Pleas of the Crown, Bacon's Abridgement, and Stephen's Digest of Criminal Law. The statements of the text writers on this subject appear to be founded upon decisions given by the Court of King's Bench and the Star Chamber in *Lady Russell's Case* (2) early in the reign of James I., and to have the sanction of the two Chief Justices and the Chief Baron, one of the Chief Justices being Sir Edward Coke. The effect of the decisions is to establish that the forcible entry of an owner where his premises are held against him by his servant is not indictable under the statutes of forcible entry or as a riot. Comyns C.B. (3) says: "It will not be a riot, ... if the servants of the owner of a house enter by force, by command of their master, when the servants of him, who has the custody of the house, oppose them," and for this he cites the report of *Lady Russell's Case* (4) in Moore.

In my view of the evidence in the present case, however, the occupation of the plaintiffs was that of mere trespassers, as Mr. Henn Collins on their behalf asserted. The service had been for some time at an end, and the holding was adverse as against the defendant company. But this does not dispose of the matter in favour of the plaintiffs. Whether an indictment for forcible entry can be maintained when the complainant has no interest in the premises is a question upon which varying opinions have been entertained. Cases decided in the seventeenth and eighteenth centuries, to which reference was made in the argument, clearly establish that at any rate until the time of Queen Anne it was essential that the title of the complainant should appear in an indictment for forcible entry and that a tenancy at will was not an estate or interest in respect of which an indictment for forcible entry would lie. On the other hand it was held in *Rex* v. *Williams* (1) and in *Reg.* v. *Child* (2) that title is immaterial, that the material question as to the complainant is whether he was in possession, and the material question as to the defendants whether they in a violent and tumultuous manner deprived him of possession. Modern practice has, I think, proceeded upon the later decisions, but the practice of Criminal Courts as to the forms of indictments does not affect the question whether a man who was wrongfully in occupation of land can maintain an action in respect of moderate and necessary force used by the owner to expel him, and there is authority extending at any rate from the fifteenth century to the nineteenth to the effect that such an action cannot be maintained. The Year Book of 15 Hen. 7 (3) records a decision of all the judges that if a man enters with force upon a party who has no title to possession the complainant has no cause of action, but he who enters by force may be punished upon indictment. Lord Kenyon's declaration in *Taunton* v. *Costar* (4), "If indeed the landlord had entered with a strong hand to dispossess the tenant"—who was holding over—"by force, he might have been indicted for a forcible entry; but there can be no doubt of his right to enter upon the land at the expiration of the term"; the judgment of the Court of King's Bench in *Browne* v. *Dawson* (5); and the opinion of Parke B. in *Harvey* v. *Brydges* (6) that "where a breach of the peace is committed by a freeholder, who, in order to get into possession of his land, assaults a person wrongfully holding possession of it against

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(1) 2 Ex. 203, 821.

(2) Moore, 786; Cro. Jac. 17.

(3) Com. Dig., Forceable Entry, D. 11.

(4) Moore, 786.

(1) 4 Man. & R. 471.
(2) 2 Cox C. C. 102.
(3) Hil, 15 Hen. 7, f. 17, pl. 12.
(4) 7 T. R. 432.
(5) 12 A. & E. 624.
(6) 14 M. & W. 437, 442.

his will, although the freeholder may be responsible to the public in the shape of an indictment for a forcible entry, he is not liable to the other party"; are merely some instances of declarations of opinion which have been made on numerous occasions by common law judges of eminence with regard to the questions here at issue.

In my opinion the law is correctly stated in the long series of pronouncements adverse to the claim of the present plaintiffs which were cited before us, and the decisions in *Newton* v. *Harland* (1) and *Beddall* v. *Maitland* (2) were erroneous.

I think the appeal should be allowed and judgment in the action entered for the defendants.

Appeal allowed.

Solicitors for appellants: *Torr & Co., for Herbert H. Ryland, Windsor.*

Solicitor for respondents: *Edwin Herrin.*

W. H. G.

[IN THE COURT OF APPEAL.]

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Oct. 29, 30:
Nov. 21.

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[1918. C. 1742.]

Alien Enemy—Trading with the Enemy—Company incorporated in Belgium—"Enemy"—Territory in hostile Occupation—"Carrying on business"—Trading with the Enemy Proclamation, September 14, 1915.

By a Proclamation, dated September 14, 1915, it was provided: "For the purposes of the Proclamations for the time being in force relating to Trading with the Enemy, the expression 'enemy,' notwithstanding anything in the said Proclamations, is hereby declared to include, and to have included, any incorporated company or body of persons (wherever incorporated) carrying on business in an enemy country or in any territory for the time being in hostile occupation."

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(1) 1 Sc. N. R. 474; 1 Man. & G. 644.

(2) 17 Ch. D. 174.

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In January, 1914, the plaintiffs entered into a contract with the defendants, who were a company incorporated under the laws of Belgium and had their registered office at Antwerp, to sell to them manganese ore deliverable in certain quantities during the second half of 1914 and the three following years alongside steamer in Bombay. The shipments contemplated by the contract were to European or American ports, and the defendants, when asked to do so, were to open an irrevocable credit in favour of the plaintiffs' agents at a London bank.

In September, 1914, when the German armies were threatening Antwerp, the managing director of the defendant company removed all the company's goods and the money in bank to London and came himself to London, and there, without any formal authority from the company, carried on business in his own name, but for the benefit of the company. The company's premises at Antwerp were converted into a national kitchen and a Red Cross hospital. After the German occupation of Antwerp the German authorities placed the company under compulsory administration. During the German occupation meetings of the directors and shareholders were held at which formal business was transacted. These meetings were held so as to comply with Belgian law and to keep the company in existence. The company also collected and paid debts due to and owing by it in order to prevent the German authorities from winding up the company and investing the uncalled capital in German war loan, and with the like object it created a debt against its uncalled capital in favour of its bankers for the purpose of paying arrears of dividend on its preference shares. The plaintiffs contended that the company was an "enemy" within the meaning of the Proclamations, as it "carried on business" in territory in hostile occupation, and they claimed a declaration that the contract was dissolved and was no longer binding on them. The company counterclaimed for a declaration that the contract was valid and subsisting and that deliveries under it were suspended during the war:—

Held, by Bankes L.J. and Duke P. (Scrutton L.J. dissenting) that the plaintiffs were entitled to the declaration claimed. Though acts which were necessary merely for the purpose of keeping the company in existence might not amount to "carrying on business" within the meaning of the Proclamation, the collection of debts and discharge of liabilities with the intention of continuing the business amounted to a "carrying on business," and constituted the company an "enemy" within the Proclamation.

APPEAL from the judgment of Rowlatt J. at the trial of the action without a jury.

The plaintiffs were a joint stock company incorporated under the laws of India and having their registered office in Bombay. The defendants were a joint stock company incorporated under the laws of Belgium and having their registered office in Antwerp. They carried on the business of merchants, which was almost entirely a foreign business.

largely with the Congo. The writ in the action (1) was issued on October 24, 1918.

The plaintiffs claimed, (1.) a declaration that an agreement dated January 30, 1914, was since February 16, 1915, abrogated and avoided and since that date was of no force and effect; and (2.) a declaration that the plaintiffs since that date had been absolved and released from every duty and obligation in the agreement contained, and were not bound in any manner to observe or perform any of the terms thereof. By way of counterclaim the defendants claimed, (1.) a declaration that the agreement was a valid and subsisting agreement; and (2.) a declaration that all deliveries were suspended under it during the war and for a reasonable time thereafter.

By the contract, which was made in Paris, the plaintiffs agreed to sell to the defendants 115,000 tons of Indian manganese ore to be delivered in certain quantities during the second half of 1914 and during the three following years. The delivery was to be in Bombay alongside steamer, the shipments contemplated by the contract being to European or American ports. The defendants, when asked to do so, were to open an irrevocable credit in favour of the plaintiffs' agents in London at a London bank. There was a clause providing for the settlement of any dispute by arbitration in London.

When the war broke out in August, 1914, and after the invasion of Belgium by the Germans, Mr. Van der Taelen, the managing director of the defendant company, and Mr. Peeters were the only two directors of the company in Antwerp, the other directors being in the occupied parts of Belgium and unable to communicate with Antwerp. Van der Taelen had previously seen the vice-chairman of the company, and the latter gave Van der Taelen "carte blanche to do what he could." Accordingly, when the German armies were threatening Antwerp the two directors, without any formal authority from the board of directors, transferred

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(1) The writ was issued under Enemies Act, 1915 (5 Geo. 5, c. 36).
the Legal Proceedings against

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all the company's goods, worth about 280,000*l.*, consisting largely of rubber, and the cash in the bank, amounting to 48,000*l.*, to England; and Van der Taelen went to England with such of the company's books as were necessary to carry on the business, but not the register of shareholders and the minute books. The company's premises in Antwerp were converted as to the lower part into a national kitchen and as to the upper part into a Red Cross hospital. Van der Taelen carried on business at an office in London in his own name, but for the benefit of the company, and did not return to Belgium until after the armistice. The company's name was not put up in the office, nor was the company registered under s. 274 of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69). Van der Taelen also represented other Belgian companies in London. Peeters, the director who remained in Antwerp, stated in his evidence that all transactions (in Belgium) were closed in the company's books at the end of September, 1914.

The German armies entered Antwerp on October 9, 1914, and on February 20, 1916, the German authorities in Brussels placed the company under compulsory administration and appointed a compulsory administrator.

During the German occupation meetings of the board of directors were held in Brussels on March 11, 1915, October 8, 1915, October 29, 1917 and July 23, 1918, at which formal business was transacted, such as approving the provisional accounts for 1914, approving a subscription to the food fund, and approving a scheme to be submitted to the shareholders for a transformation of the capital of the company. At the meeting on July 23, 1918, the board agreed that the company's bankers, who were large shareholders in the company, should pay the coupons of the preference shares of the company for the past four years, thus creating a debt against the company's uncalled capital which they hoped would prevent the German authorities from calling it up and investing the money in the German war loan. At this meeting the board also agreed to guarantee a debt due to a German subject from a third party, the consideration being the raising of the sequestration on the company. Meetings of the shareholders were held at Antwerp on April 9, 1915, when the provisional balance sheet and profit and loss account for 1914 were approved, and the appointment of a director was confirmed, retiring directors were re-elected, and a secretary and auditor were appointed; and on December 11, 1917, when the scheme for the transformation of the capital of the company was passed. These directors' and shareholders' meetings were held so as to comply with the law of Belgium and thus to maintain the existence of the company. The company also collected certain debts due to and paid certain debts owing by it in order to prevent the German authorities from winding the company up and investing the uncalled capital in the German war loan. A meeting of shareholders was also held at Antwerp on May 19, 1919 (after the armistice), when the chairman spoke of the services rendered by Mr. Van der Taelen, who had, he said, conducted the affairs of the company in London during the war.

The statement of claim alleged that by a Royal Proclamation of February 16, 1915 (1), it was declared that Proclamations

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(1) The following are the material Proclamations:—

Trading with the Enemy Proclamation, No. 2 (dated September 9, 1914) (set out in Statutory Rules and Orders, 1914, vol. iii., p. 326). Clause 2: "The expression 'enemy country' in this Proclamation means the territories of the German Empire and of the Dual Monarchy of Austria-Hungary, together with all the colonies and dependencies thereof." Clause 3: "The expression 'enemy' in this Proclamation means any person or body of persons of whatever nationality resident or carrying on business in the enemy country, but does not include persons of enemy nationality who are neither resident nor carrying on business in the enemy country. In the case of incorporated bodies, enemy character attaches only to those incorporated in an enemy country." Clause 5: The following prohibitions shall have effect, except under licence, "and We do hereby accordingly warn all persons resident, carrying on business or being in Our Dominions—(1.) Not to pay any sum of money to or for the benefit of an enemy. (2.) Not to compromise or give security for the payment of any debt or other sum of money with or for the benefit of an enemy. . . . . (7.) Not directly or indirectly to supply to or for the use or benefit of, or obtain from, an enemy country or an enemy, any goods, wares or merchandise, nor directly or indirectly to supply to or for the use or benefit of, or obtain from any person any goods, wares or merchandise, for or by way of transmission to or from an enemy country or an enemy, nor directly or indirectly to trade in or carry any goods, wares or merchandise relating to trading with the enemy should apply to territory in hostile occupation as they applied to an enemy country; that at all times material Antwerp was territory in hostile occupation within the meaning of the Acts and Proclamations relating to trading with the enemy, and that the defendants were for the purposes of the said Acts and Proclamations enemies; and that by reason thereof it became illegal for the plaintiffs to carry out the terms of the agreement.

Rowlatt J. held that the case turned upon the meaning of the words in the Proclamation of September 14, 1915, "any incorporated company carrying on business in an enemy country or in any territory for the time being in hostile occupation."

destined for or coming from an enemy country or an enemy."

Trading with the Enemy (Occupied Territory) Proclamation, 1915 (dated February 16, 1915) (set out in Statutory Rules and Orders, 1915, vol. iii., p. 273), after reciting that "certain territory forming part of the territory of an enemy country is or may be in the effective military occupation of Us or Our Allies, or of a neutral State (in this Proclamation referred to as 'territory in friendly occupation'), and certain territory forming part of Our territory or of that of an allied or neutral State, is or may be in the effective military occupation of an enemy (in this Proclamation referred to as 'territory in hostile occupation')," and that "it is expedient in Our interest and in that of Our Allies that the Proclamations relating to trading with the enemy should apply to territory in friendly occupation as they apply to Our territory or that of Our Allies, and should apply to territory in hostile occupation as they apply to an enemy country," provides (clause 1): "The Proclamations for the time being in force relating to trading with the enemy shall apply to territory in friendly occupation as they apply to Our territory or that of Our Allies, and to territory in hostile occupation as they apply to an enemy country."

Proclamation relating to trading with the enemy, dated September 14, 1915 (set out in Statutory Rules and Orders, 1915, vol. iii., p. 275): "Whereas doubts have arisen as respects the position under the Proclamations for the time being in force relating to Trading with the Enemy of incorporated companies or bodies of persons which, though not incorporated in any enemy country or in territory in hostile occupation, carry on business in any such country or territory: and whereas it is expedient that the position of those companies or bodies for the purposes of those Proclamations should be defined": it is declared as follows: "For the purposes of the Proclamations for the time being in force relating to Trading with the Enemy, the expression 'enemy,' notwithstanding anything in the said Proclamations, is hereby declared to include, and to have included, any incorporated company or body of persons (wherever incorporated) carrying on business in an enemy country or in any territory for the time being in hostile occupation."

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The company were not carrying on business in London. What did they do in Antwerp? They held the necessary meetings of directors and shareholders to comply with the law and to keep the company alive and prevent the company from being wound up by the Germans, they collected and paid local debts and borrowed money from a bank to pay dividends so as to create a debt against their uncalled capital. That was all they did, and therefore they were clearly not carrying on their commercial business; but they were carrying on business within the meaning of the Proclamation. "Carrying on business" referred, as in the Income Tax Acts, to operations at the head office where the head and brains and seat of the company were. The defendants said that this contract was an existing contract of the company and the company were living, as far as a company could live, at the head office, though at the moment they were not able to do any active business; but they were existing for the purpose of holding this contract, assuming it was a valid contract, and therefore in his opinion on the special facts of this case the Proclamation made void as trading with the enemy a contract with a company the seat of whose business was in hostile territory. He therefore gave judgment for the plaintiffs for the declaration claimed.

The defendants appealed.

A. Grant K.C. and *Micklethwait* for the defendants. The defendant company was not an enemy at common law. The question is whether it was an enemy under the Proclamations. That depends upon whether it was "carrying on business" in territory for the time being in hostile occupation within the meaning of the Proclamation of September 14, 1915. That Proclamation was issued in consequence of the decision in *Société Anonyme Belge des Mines d'Aljustrel* (*Portugal*) v. *Anglo-Belgian Agency* (1) and is founded on the common law and on s. 1 of the Trading with the Enemy Act, 1914 (4 & 5 Geo. 5, c. 87). The company ceased to carry on business in Belgium after the outbreak of war. It was carrying on business, if at all, in London. It did no trade in Belgium during the German occupation. The necessary meetings of directors and shareholders as required by Belgian law were held for the purpose of preserving the existence of the company, and preventing it being wound up and its uncalled capital called up and invested in the German war loan, and certain business, mostly formal, was transacted at these meetings. The whole of the company's assets and the money at its bankers were transferred to London.

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(1) [1915] 2 Ch. 409.

The findings of fact of the learned judge are in the defendants' favour, but he wrongly applied the income tax law as to residence to the expression "carrying on business." The two matters are quite distinct. At common law, to make a British or neutral subject resident in an enemy country an enemy he must be voluntarily residing or carrying on business there: *The Ocean* (1); *Bromley* v. *Hesseltine* (2); *Roberts* v. *Hardy*. (3) In this last case Lord Ellenborough treated it as adhering to the King's enemies. The doctrine has never been applied to an involuntary residence. It is clear that the defendant company was not voluntarily residing in Belgium after the German occupation. A company is not like an individual who can leave the country. A company is tied to the place where it is incorporated and cannot leave. Nor did it carry on business in Belgium. Rowlatt J. found that the company did not carry on its commercial business there. The expression "carrying on business" in the Proclamation of September 14, 1915, does not include the doing of acts either for the mere purpose of winding up the company's business or for the purpose of preserving the existence of the company. The company was bound by Belgian law to do certain acts, such as holding meetings of directors and shareholders; and all that the defendant company did in Brussels or Antwerp, including the collection and payment of debts, was done for the purpose of keeping the company in existence. It is like an individual taking food or medicine to keep himself alive. In s. 87 of the

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(1) (1804) 5 C. Rob. 90.
(2) (1807) 1 Camp. 75.
(3) (1815) 3 M. & S. 533.

Companies (Consolidation) Act, 1908, the word "business" cannot include the doing of acts for the mere purpose of keeping the company alive. The Proclamation is of a criminal nature, and a strained construction should not be placed upon it. [*Antoine* v. *Morshead* (1); *Daubuz* v. *Morshead* (2); and *Tingley* v. *Müller* (3) were also cited.]

A. Neilson K.C. for the plaintiffs. The decision of the learned judge was right. No doubt Van der Taelen, the managing director of the company, did all he could to transfer the company's assets to England, and he proceeded to carry on business here. He purported to carry on business on behalf of several Belgian companies, but he carried on business in his own name and not in the name of the defendant company. The company's name was not put up in the office; nor did he register the company under s. 274 of the Companies (Consolidation) Act, 1908. He had no formal authority from the company to carry on the company's business here. But the real question is, Did the company carry on business in Brussels or Antwerp during the German occupation? It is clear from the minutes that it did. The company elected directors, secretary and auditor, and it collected and paid debts. If keeping alive is the test, that must involve carrying on business. The object of the Proclamations was to prevent communication with the enemy, and this contract involves communication and is dissolved: *Zinc Corporation* v. *Hirsch* (4); *Ertel Bieber & Co.* v. *Rio Tinto Co.* (5) The guarantee by the company of the debt due to the German is directly within the Proclamation.

Mickllethwait in reply. Merely collecting and paying debts is not carrying on business within the meaning of the Proclamation. Merely keeping alive is not "carrying on business." The company expressly refused to do business. If the judgment is right, it applies to every company in Belgium.

Cur. adv. vult.

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(1) (1815) 6 Taunt. 237.
(2) (1815) 6 Taunt. 332.
(3) [1917] 2 Ch. 144.
(4) [1916] 1 K. B. 541.
(5) [1918] A. C. 260.

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Nov. 21. The following judgments were read :—

BANKES L.J. This is an appeal from a decision of Rowlatt J. The appellants are a Belgian company, incorporated under the laws of Belgium, who prior to the war had their registered office at Antwerp, and carried on business there. The business was that of merchants dealing in goods purchased from abroad. In the month of January, 1914, the respondents had entered into a contract whereby they had agreed to sell to the appellants large quantities of Indian manganese ore, deliverable over the years 1914, 1915, 1916, 1917. In the month of October, 1918, the respondents commenced the present action claiming a declaration that the said contract had since February 16, 1915, been dissolved and was no longer binding upon them. The appellants counterclaimed for a declaration that the contract was subsisting, and that deliveries under it were suspended during the war. September 14, 1915, is the date of the Proclamation by which it was declared that for the purposes of the Proclamations for the time being in force relating to trading with the enemy, the expression "enemy" notwithstanding anything in the Proclamations was declared to include, and to have included, any incorporated company or body of persons (wherever incorporated) carrying on business in an enemy country, or in any territory for the time being in hostile occupation. Prior to the making of this Proclamation the test of enemy character in the case of incorporated bodies had been the incorporation in an enemy country. The alteration in the test to be applied was made in consequence of the decision of this Court in *Société Anonyme Belge des Mines d'Aljustrel (Portugal)* v. *Anglo-Belgian Agency.* (1) The only question which was dealt with in the Court below was whether the appellants were at any material time carrying on business in a territory for the time being in hostile occupation. The learned judge held that they were. With all respect to him I think that he applied his mind to matters which had a greater bearing upon the question of whether the appellants were resident in Belgium than upon the question of whether they carried on business there. The Proclamation contains no indication of what constitutes a carrying on of business. It is necessary therefore to interpret the expression with reference to the mischief aimed at by the Proclamation itself.

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(1) [1915] 2 Ch. 409.

The Proclamation forms part of that branch of our law which deals with trading with an enemy. The law is to be found partly in the common law, partly in statutes, and partly in Proclamations. It rests upon public policy. Its object is to prevent dealings or transactions which may result in detriment to this country, or advantage to the enemy. To secure its object it renders trading with an enemy a punishable offence; and abrogates and puts an end to all executory contracts which for their further performance require commercial intercourse between the one contracting party and the other contracting party if an enemy. As is pointed out by Younger J. in the case to which I have already referred (1), the word "enemy" is used in many different senses in our law. "It has one signification at common law; it is used in another sense in the Courts Emergency Powers Act and in the Aliens Restriction Order; in a third, in the Proclamations as now promulgated; and in a fourth, in, amongst other places, s. 3 of the Trading with the Enemy Amendment Act, 1914." The fact that mere residence in an enemy country, unless involuntary, is of itself sufficient to constitute an individual an enemy is conclusive to show that what this branch of the law is considering is not the loyalty or disloyalty of the individual, or his capacity to do actual harm to this country, or to be of real advantage to the enemy, but the question whether his position is such that either he, or the actual enemy, has or may have the opportunity of using his position to the advantage of that enemy, or to the detriment of this country. The payment of money to an individual resident in an enemy country is obviously one of that class of acts which may tend to the advantage of the enemy, however loyal to this country the person to whom the payment is made may be, or however desirous of preventing the enemy gaining any advantage from the payment. The provisions of the Trading with the Enemy Proclamation No. 2, September 9, 1914, may be referred to in this connection. The preamble recites that it is "contrary to law for any person resident, carrying on business or being in Our Dominions, to trade or have any commercial or financial transactions with any person resident or carrying on business in the German Empire, or Austria-Hungary without Our permission." It defines enemy country (clause 2). It defines enemy (clause 3) as meaning "any person or body of persons of whatever nationality resident or carrying on business in the enemy country." It includes among the prohibitions (clause 5 (1)) the payment of any sum of money to or for the benefit of an enemy. It became necessary later to extend the definition of enemy country so as to include "territory in hostile occupation," and this was done by the Trading with the Enemy (Occupied Territory) Proclamation, 1915, February 16, 1915.

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(1) [1915] 2 Ch. 409, 417.

I have so far only referred to the position of an individual resident or carrying on business in an enemy country. It is obvious that an incorporated company must be just as much within the mischief aimed at by this branch of our law as an individual. I can see no real reason why any distinction should from this point of view be drawn between the one and the other, except the distinction which for the purposes of a definition may have to be made in the language used in reference to an incorporated body. The only distinction between the individual and the incorporated body to be found in the Proclamation No. 2 of September, 1914, is in the definition clause (clause 3), which provides that "in the case of incorporated bodies, enemy character attaches only to those incorporated in an enemy country," or after the date of the Proclamation of February, 1915, in "territory in hostile occupation." In the case of an incorporated body which falls within this definition the mere fact of incorporation in the enemy country is sufficient to attach enemy character. This Court has decided in the case

I have already referred to (1) that a company in exactly the same position as the appellants, that is to say, incorporated according to the laws of Belgium, and having its registered office at Antwerp, is not incorporated in a territory in hostile occupation. But for the view taken in that case as to the proper interpretation of the language used in the Proclamation, the mere fact of incorporation would of itself have attached enemy character to the appellants whether they were carrying on business or not.

It was no doubt in consequence of this decision that the Proclamation of September 14, 1915, further defining the expression "enemy" in the Trading with the Enemy Proclamations was made. The further definition is in these words: "For the purposes of the Proclamations for the time being in force relating to Trading with the Enemy, the expression 'enemy,' notwithstanding anything in the said Proclamations, is hereby declared to include, and to have included, any incorporated company or body of persons (wherever incorporated) carrying on business in an enemy country or in any territory for the time being in hostile occupation." It must be noticed that the effect of this alteration is to get rid of one of the distinctions which was made in the definition clause of the Proclamation of September, 1914, between an individual and an incorporated body. Both are now tainted with enemy character, if they carry on business in an enemy country. It is no doubt a pure question of fact whether either an individual or an incorporated body is really carrying on business in an enemy country. Both must be judged by the same standard. What would amount to a carrying on business in the one case must amount to a carrying on business in the other; and I think it is of assistance to ask oneself the question whether the acts which are said in the present case to constitute a carrying on of business would, had the case been that of an individual, have carried conviction that they were. The acts relied on may I think be divided into two classes: (1.) The acts which are said to have been necessary in order to keep the appellant

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company in existence, and under this head would come the holding of directors' and shareholders' meetings, and the doing at those meetings of the business appearing on the minutes. (2.) The collection of debts by the company, and the payment of debts and the arrangement of liabilities by the company. It is contended for the appellants that they had ceased to do business, and must be regarded, so far as the first class of acts is concerned, merely as a company taking the necessary steps to keep itself in existence; and, so far as the second class of acts is concerned, either as a company which had retired from business, and was getting in its assets and discharging its liabilities in the course of winding up its business, or as a company which was getting in money wherewith to pay its debts, so as to avoid being wound up by any hostile action by the Germans.

I think that the evidence points clearly to the conclusion that the appellants cannot be regarded as a company which had retired, or was intending to retire, from business, and was merely winding up its affairs preparatory to a complete shutting down of all business. On the contrary all the efforts of the appellants appear to have been directed to securing the continuance of the company in business, though for the moment it was impossible to carry on their business in the accustomed way. If other evidence on this point is required beyond what appears in the minute books of the company, it will be found in the fact that in this action the appellants are contending that the respondents are bound to complete deliveries under the contract of January, 1914. I am inclined to accept the view that acts which are necessary merely for the purpose of keeping the company in existence would not amount to a carrying on of business within the meaning of the Proclamation, and that such acts may be compared in the case of an individual trader to the taking of sufficient nourishment to keep himself alive. I take a different view however of the second class of acts. What the appellants were undoubtedly doing was collecting such debts and discharging such liabilities as existing conditions rendered it possible to collect and discharge, and were doing this under circumstances which made it plain that the intention of the appellants was to continue in, and not to retire from, business. It is quite true that the appellants' principal place of business was closed as a place of business, and devoted to other purposes; it is also true that the managing director had removed all the assets that were capable of being removed to England; but it must also be true that the appellants had made such arrangements as were necessary to enable the collection of debts and the discharge of liabilities to go on. In my opinion this is a carrying on of business within the meaning of the Proclamation. It is immaterial that all buying and selling were impossible, if sufficient was done to amount to a carrying on of business. If an individual issued a notice to his customers to the effect that the supplying them with goods during the continuance of the war was impossible, but that he would attend at a given address (not that of his former office) daily to receive payments and discharge obligations, and that he intended to continue the performance of existing contracts the moment hostilities ceased, he would, in my opinion, still be carrying on business. In my opinion if a person resident in this country paid money to or for the benefit of an individual in an enemy country who had issued such a notice he would be committing an offence against the Trading with the Enemy Proclamations, and that because such a person would be carrying on business in the enemy country. The fact so much insisted upon by Mr. Grant that the appellants had been obliged to discontinue the main and principal part of their business is, in my opinion, immaterial, if the fact be that they continued to carry on any part however comparatively insignificant. This, as I have said, the appellants, in my opinion, continued to do, and I think, therefore, that the appeal fails and must be dismissed with costs.

SCRUTTON L.J. The Central India Mining Co., Ld., of Bombay, whom I call "the Indian company," had at the outbreak of the great European war in August, 1914, a contract dated January 30, 1914, with La Société Coloniale

Anversoise, a company incorporated under the laws of Belgium, whom I call "the Belgian company." The contract was for the supply of 115,000 tons of manganese ore, delivered Bombay. The contract contemplated shipment to European or American ports, and a credit for payment at a London bank. The contract was made in Paris and could be performed without anything being done in Belgium at all, except the authorization of some one to act on behalf of the Belgian company outside Belgium, and even this authorization could be arranged to take place outside Belgium. In September, 1914, when the approach of the Germans to Antwerp became threatening, the Belgian company shipped all their goods, nearly 300,000*l.* worth, to England; their managing director came to England also with all available funds of the company, and all business transactions of the company in Belgium were closed. Mr. Van der Taelen in London claimed force majeure as excusing him from taking delivery in India; he alleged the suspension of the contract by war, but objected to pay an increased price provided in the contract for suspended quantities. Some correspondence passed in 1915 between Mr. Van der Taelen and the Indian company, which may or may not be an agreement to suspend deliveries during the war; the point has not been argued or decided. In February, 1916, the Belgian company was placed by the German authorities under a compulsory German administrator, but apparently no trading business was done. In 1916 the Indian company desired to cancel, but Mr. Van der Taelen objected. On October 24, 1918, the Indian company issued a writ asking for a declaration that the agreement has been since February 16, 1915, the date of a Proclamation to be referred to, abrogated and avoided. The statement of claim put the ground of the avoidance on Proclamations making the Belgian company an alien enemy with whom it was illegal to carry out the agreement. The defence set out the position in fact of the Belgian company and denied that they were enemies, and counterclaimed a declaration that the contract was valid and subsisting and had a certain meaning. It is obvious that under this counterclaim it could have been argued and decided whether the performance of the contract under the circumstances was frustrated, so that the parties were freed, under the doctrines explained by the House of Lords in *Metropolitan Water Board* v. *Dick, Kerr & Co.* (1) But the discussion at the trial turned entirely on the question whether the Belgian company were alien enemies, and no argument took place and no decision was given on the question of frustration, which remains open to the parties. Rowlatt J. held that the Belgian company was under the Proclamations an alien enemy, and the contract was therefore void. The Belgian company appeals to this Court.

The Proclamations in question stand as follows: On September 9, 1914, the King issued a Proclamation warning his subjects not to supply to an enemy any goods, provided that where an enemy has a branch locally situate in British territory transactions with such branch should not be treated as transactions with an enemy. It is unnecessary to consider whether this Proclamation was more than a warning of the Government's view of the common law, for a statute of 1914 (4 & 5 Geo. 5, c. 87, s. 1, sub-s. 2) gave it or any subsequent Proclamation on the subject statutory force. The first Proclamation had made it an offence to have specified dealings with persons resident or carrying on business in Germany or Austria-Hungary, but in the case of incorporated companies only with those incorporated in an enemy country. This did not deal with territories occupied by the enemy, so a second Proclamation of February 16, 1915, applied the first to territory in hostile occupation as if it were an enemy country. The framers of the Proclamation seem not to have thought out the bearing of this on incorporated companies. These are not incorporated in a particular place, but under the laws of a particular country; and if only part of a country is occupied by the enemy, it was argued that there was no reason to treat a company as incorporated in that part, or in the part free from enemy occupation. It was incorporated under the laws of the whole country, part of which was not

(1) [1918] A. C. 119.

occupied by the enemy. The Court of Appeal held this argument sound in *Société Anonyme Belge des Mines d'Aljustrel (Portugal)* v. *Anglo-Belgian Agency* (1), relating to a company whose office was in Antwerp, which they held not to be an enemy under the Proclamation. Pickford L.J. doubted, and I share his doubts; but we are, of course, bound by that decision, which shows that so far the Belgian company was not an alien enemy. But Pickford L.J. suggested that the matter might be dealt with by another Proclamation, and accordingly by a Proclamation of September 14, 1915, the term "enemy" was to be deemed to have included (an odd retrospective provision) "any incorporated company . . . . carrying on business . . . . in any territory for the time being in hostile occupation." Did then the Belgian company carry on business in Antwerp during its German occupation? Rowlatt J. has found that they did not carry on commercial business, but wound it up. As Mr. Peeters said, they closed all transactions in 1914. They kept the company alive to prevent the Germans winding it up and investing the uncalled capital of the company in German war loan; they gave one guarantee of a commercial debt to a German subject, with apparently the same object, and they had a few formal meetings. I agree with Rowlatt J.'s view on this point, for which there is ample evidence.

But the learned judge took the view that, as their head office or seat of business was in Antwerp, they were living there as a company though they did not and could not do any active business, and that this was "carrying on business." This seems to me to treat residence as carrying on business, though the two are distinguished in the Proclamations, and only carrying on business or incorporation is material to companies. The learned judge was very familiar at the Bar and on the Bench with revenue cases, and I cannot help thinking that when he uses the time-honoured phrase "head and brains and seat," used in so many cases about residence of companies, he has applied the criteria of residence to a case where residence is not material. I cannot come to the

(1) [1915] 2 Ch. 409.

conclusion that the existence of the company in Belgium is the same as its carrying on business. The Proclamation applies also to companies not incorporated in Belgium, if they carry on business there, and I think this means actual business, not the existence of an office and an agent who does not act.

It may be said that, even if the Belgian company did not carry on business, yet if this contract had been carried out they would have carried on business, and then the contract would have been illegal. But the essential feature is not merely carrying on business, but carrying it on in territory in the occupation of the enemy. Now, as I have pointed out, this contract might have been carried out without anything being done in Belgium at all; and it is clear law that where a contract can be performed in two ways, one legal the other illegal, it is not avoided unless there is an intention to perform it in the illegal way: *Waugh* v. *Morris*. (1)

The contract would of course be illegal if the contract were with a German, for the reasons stated by the House of Lords in the *Rio Tinto Case* (2), and also if the contract were with a Belgian private resident, but this would be because of the terms of the Proclamation. It was said that it must be illegal to remit money to the Belgian company, and I think this would be so, but not because the company was carrying on business in Belgium and therefore an enemy. It would be because such money must be for the benefit of the German enemy who had the recipient in his power and could seize the money; and also because it would be difficult to remit except to an actual individual, who would be an enemy under the Proclamation.

"Alien enemy" has been said to be an "odious plea" (*Casseres* v. *Bell* (3); see also *Harman* v. *Kingston* (4)); though I agree with Lord Davey in *Janson* v. *Driefontein Consolidated Mines* (5), that even then the interests of the country require a fair adjudication without a leaning against the

(1) (1873) L. R. 8 Q. B. 202, 208.
(2) [1918] A. C. 260.
(3) (1799) 8 T. R. 166, 167.
(4) (1811) 3 Camp. 150.
(5) [1902] A. C. 484, 499.

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plea; but I think when a private individual sets up after the war this plea to enable him to get out of an unprofitable contract which during the war he was desirous of enforcing, the Court may fairly require him to prove his case strictly.

In this case I am clear that the Belgian company was not an enemy in fact or intention, and after the best consideration I can give to the arguments I think it was not an enemy under the words of the Proclamation. The contract cannot therefore, in my opinion, be avoided on the ground of alien enemy or illegality, if it still survives as a binding contract on other grounds, on which I express no opinion.

The appeal in my view should be allowed with costs here and below on the claim. The Court cannot express any opinion on the counterclaim which has not been argued.

Duke P. In my opinion the appellant company was at the times material for consideration in this appeal a company carrying on business in territory occupied by the enemy, within the meaning of the Proclamations. The company maintained its existence as a business concern, or in other words had its being in that territory, and it in fact did there numerous acts of the kind commonly known as business transactions, though it did not seek to engage in new commercial dealings with other concerns. In case any deliveries of ore under the contract in question had been made outside of Belgium they would have been made for the benefit of a concern which was wholly under the management of persons resident within the area effectively controlled by the German armies, and it would have been in the power of those persons to have rendered the proceeds of such deliveries available to the de facto administrators of Belgium. This is plainly against the policy of the Proclamations. I share the regret of Rowlatt J. at the conclusion which results from these facts—namely, that the judgment under appeal ought to be affirmed.

Appeal dismissed.

Solicitors for plaintiffs: *Sanderson, Adkin, Lee & Eddis.*

Solicitors for defendants: *Freshfields & Leese.*

W. F. B.

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1919
Nov. 26, 27
Dec. 17.

Customs—Importation of Goods—Power to prohibit import of "*arms, ammunition, gunpowder, or any other goods*"*—Construction—Ejusdem generis—Prohibition of Pyrogallic Acid—Validity of Prohibition—Customs Consolidation Act,* 1876 (39 *&* 40 *Vict. c.* 36), *s.* 43*—Prohibition of Import* (*No.* 32) *Proclamation,* 1919.

Sect. 43 of the Customs Consolidation Act, 1876, provides that: "The importation of arms, ammunition, gunpowder, or any other goods may be prohibited by Proclamation or Order in Council":—

Held, that in that section the meaning of the words "any other goods" is restricted to things of the same class as those previously specified, and, therefore, that a Proclamation purporting to prohibit the importation of an article which was not of that class was illegal and invalid.

Information on behalf of the Crown.

On or about August 17, 1919, the defendant, John Brown, trading as Brown and Forth, chemical manufacturers, of Manchester and London, imported into the United Kingdom at Manchester six casks of pyrogallic acid on the steamship *Bovic* from New York.

On August 29, 1919, at Manchester, an officer of Customs and Excise seized the goods as forfeited to the Crown, and duly notified the defendant of the seizure. The defendant's firm claimed the goods as not so forfeited.

During September, 1919, correspondence passed between the defendant's firm or their solicitors and the officer of Customs in the course of which the officer of Customs informed the solicitors that, as a claim to the pyrogallic acid in question had been made on behalf of the defendant's firm, proceedings would be taken in the High Court for its condemnation; and the defendant's firm, while stating that the acid had been ordered by them from the Mallinckrodt Chemical Company, Montreal, Canada, on June 17, 1919, explained that they were unable to give documentary evidence of the kind required of its Canadian origin, and that for the purposes of the proceedings the officer might assume that it was of American origin. The material letters of the correspondence are set out in the judgment of the learned judge.

On October 22, 1919, an information was laid on behalf of the Crown against the defendant stating that the six cases of pyrogallic acid had been seized as aforesaid, for that pursuant to and under the powers conferred by s. 43 of the Customs Consolidation Act, 1876 (1), and all other powers enabling him in that behalf, His Majesty on June 25, 1919, by the Prohibition of Import (No. 32) Proclamation, 1919 (2), proclaimed that the importation into the United Kingdom of divers articles, and amongst them chemicals of all descriptions, was prohibited, but it was thereby provided that such prohibition should not apply to any goods of these kinds imported under licence given by the Board of Trade, and for that after the date of the Proclamation, the same being then in force, to wit on or about August 17, 1919, the said six casks of pyrogallic acid being chemicals within the Proclamation were imported into the United Kingdom, and for that no licence had been given for the importation of the same, and for that the same were imported into the United Kingdom contrary to the Proclamation and the statute; whereby the said goods were forfeited to His Majesty; and that the defendant had claimed the goods; Wherefore it was prayed that the said casks of pyrogallic acid might for the reasons aforesaid be adjudged and remain forfeited.

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(1) Customs Consolidation Act, 1876, s. 43: "The importation of arms, ammunition, gunpowder, or any other goods may be prohibited by Proclamation or Order in Council."

(2) The Prohibition of Import (No. 32) Proclamation, 1919, dated June 25, 1919, and entitled A Proclamation relating to the Importation of Certain Articles into the United Kingdom, provides: "Whereas by section forty-three of the Customs Consolidation Act, 1876, it is provided that the importation of arms, ammunition, gunpowder, or any other goods may be prohibited by Proclamation: And whereas by certain Proclamations entitled Prohibition of Import Proclamations the importation of certain goods has been prohibited accordingly: And whereas it is expedient that the importation into the United Kingdom of certain other goods should be prohibited: Now, therefore, We, by and with the advice of Our Privy Council, in pursuance of the said Act and of all other powers enabling Us in that behalf, do hereby proclaim, direct and ordain as follows:—As from and after the date hereof, subject as hereinafter provided, the importation into the United Kingdom of the following articles is hereby prohibited, viz.:—Chemicals of all descriptions. Electrical goods and apparatus, including electrical plant and machinery of all kinds, and insulating materials of all descriptions. Scientific, mathematical and optical instruments. Tungsten powder and ferro-tungsten. Provided always, and it is hereby declared, that this prohibition shall not apply to any such goods which are imported under licence given by or on behalf of the Board of Trade, and subject to the provisions and conditions of such licence.

"This Proclamation may be cited as the Prohibition of Import (No. 32) Proclamation, 1919. . . . ."

This proclamation was the thirty-second proclamation relating to the prohibition of imports that had been made under s. 43 of the Act of 1876. The first of these proclamations was made on February 15, 1916.

The defendant in his plea stated that he claimed the property of the said goods to belong to him, and that the goods were not forfeited for the several causes in the information mentioned or any of them; and further that the Proclamation was not authorized by s. 43 of the Act of 1876 or by any other powers enabling His Majesty in that behalf and was not in force on or about August 17, 1919, and that the import of the goods into the United Kingdom was not contrary to the Proclamation or to the statute.

The facts, which were admitted on both sides, as to the nature and use of pyrogallic acid are stated by the learned judge towards the end of his judgment.

Sir Gordon Hewart A.-G. and *Giveen* (*Sir Ernest Pollock S.-G.* with them) for the Crown. The pyrogallic acid in question was unlawfully imported by the defendant, and it is therefore forfeited to the Crown. It was imported in contravention of the Prohibition of Import (No. 32) Proclamation, 1919, which prohibits the import of "chemicals of all descriptions" except under licence. That Proclamation is valid, having been duly made under s. 43 of the Customs Consolidation Act, 1876. That section authorizes a Proclamation prohibiting the importation not only of arms, ammunition, and gunpowder, but of "any other goods." The section on its true construction gives the Crown power to prohibit the importation of goods of any kind whatsoever. This appears from the history of the legislation in regard to the importation and exportation of goods which ended with the Act of 1876. The Act of 1660 (12 Car. 2, c. 4), by s. 11 made it lawful to ship and transport gunpowder up to a certain value and various other things, and by s. 12 made it lawful for the

Crown by Proclamation to prohibit the transporting of gunpowder or any sort of arms or ammunition out of the Kingdom. An Act of 1685 (1 Jac. 2, c. 8) made it unlawful without licence to import gunpowder, arms, ammunition or utensils of war. These were followed by three consolidating statutes. An Act of 1825 (6 Geo. 4, c. 107), for the general regulation of the customs, provided by s. 52 that certain goods should be absolutely prohibited to be imported, and that certain other goods should be imported only under restrictions, and a table subjoined to the section set out lists of these respective classes of goods, the list of goods absolutely prohibited beginning with "Arms, ammunition, and utensils of war, by way of merchandise, except by licence from His Majesty," and, lower down, "Gunpowder; except by licence from His Majesty." An Act of 1833 (3 & 4 Will. 4, c. 52, s. 58) was so far as material to the same effect. And a later Act of 1845 (8 & 9 Vict. c. 86, s. 63) was also to the same effect. The scheme of each of these three Acts was that the Act itself directly prohibited the importation of certain articles absolutely, and of certain other articles except under restrictions; and among the articles absolutely prohibited it gave a prominent place to arms, ammunition, and utensils of war and gunpowder. The Customs Consolidation Act, 1853, which was the first Act to recognize the principle of free trade, introduced an entirely different scheme. That Act, by s. 41, declared that it should be lawful to import any goods which were not prohibited; by s. 44 it provided that the importation of certain goods should be prohibited absolutely, and that of certain other goods should be prohibited except in transit, or subject to certain restrictions, these various classes of goods being described in a table appended to the section; and by s. 45 it provided that the importation of arms, ammunition, gunpowder, or any other goods might be prohibited by Proclamation or Order in Council. As to exports it provided by s. 150 that the exportation of a large class of goods, including arms, etc., might by Proclamation or Order in Council be prohibited. That Act was repealed and superseded by the Customs Consolidation Act, 1876, the

Act at present in force, and the latter Act adopts exactly the same scheme, providing by s. 39 that it shall be lawful to import any goods which are not prohibited, by s. 42 that the importation of certain goods shall be prohibited either absolutely or except in transit, or subject to restrictions, these classes of goods being described in a table, and by s. 43 that the importation of arms, ammunition, gunpowder, or any other goods may be prohibited by Proclamation or Order in Council. As to exports it provides that the exportation of a large class of goods, including arms, ammunition, gunpowder and military and naval stores, may, by Proclamation or Order in Council, be prohibited. Under the scheme which was introduced in 1853 and is continued by the Act of 1876 the Legislature first legalises the importation of any goods which are not prohibited; secondly, it directly prohibits the importation of certain goods either absolutely or with certain limitations; and, thirdly, it empowers the Crown to prohibit absolutely the importation of arms, ammunition, gunpowder or any other goods. As the Legislature under that scheme begins by declaring it lawful to import any goods, it purposely goes on by s. 43 to give the Crown a general power of prohibiting the importation of any kind of goods whatsoever as occasion may require. The universal power to prohibit imports given to the Crown by s. 43 is to be regarded as an offset to the universal legalising of imports by s. 39. The fact that the Navigation Act of 1660 (12 Car. 2, c. 18), which had for its object to confine our foreign trade to the shipping and seamen of this country (see Chitty's Prerogatives of the Crown, ed. 1820, p. 162), had been repealed in 1826, may be taken to have been one of the considerations which induced the Legislature to give to the Crown a wide power of prohibiting imports.

That s. 43 gives to the Crown a general power to prohibit the importation of goods of every kind appears also from the language of that section, whether taken by itself or considered in relation to the other provisions of the Act. The section uses the words "any other goods," which are the most general words that could have been used, and prima facie these words must be understood in their literal meaning. Unless it had been intended that the section should give a general power of prohibiting imports of every kind, the words "any other goods" would not have been used. The meaning of these general words ought not to be narrowed because they happen to follow the particular terms "arms, ammunition, gunpowder." Under the older scheme of the legislation the importation of the goods designated by these particular terms had been directly prohibited by the statute itself. Under the new scheme they were transferred to the general category of goods the importation of which might be prohibited by proclamation, and they are specially mentioned in that category of goods merely because they had formed a familiar group in the statutes from the first, and not for the purpose of limiting that category. As s. 42 directly prohibits the importation of certain specified goods, s. 43 in giving power to the Crown to prohibit by Proclamation "any other goods" must naturally be understood as meaning any kind of goods other than those specified in the previous section. If it had been intended that s. 43 should give to the Crown a limited power of prohibiting the importation of certain particular goods only, that section would have set out a list of these goods, and would have been similar in form to s. 138, which empowers the Crown to prohibit the exportation of the particular goods which it enumerates. It must be presumed that s. 43 gives the Crown a wider power of prohibiting imports than s. 138 gives it of prohibiting exports, because in time of war the importation of the most seemingly harmless goods may become harmful by interfering with the importation of other goods of essential value.

It is reasonable on grounds of public policy that the Crown should be given a general discretionary power of prohibiting imports, in order that it may be able in any sudden emergency at once to prevent the importation of any particular goods. There is no reason why the Crown ought not to be entrusted with a general power of that kind. It cannot be supposed that it would exercise the power otherwise than in a constitutional manner and in the interest of the subjects.

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The Government could be relied upon to see that the power was reasonably exercised. In 1853, when the power was first conferred, the executive had long ceased to be autocratic, and had become and has ever since continued to be democratic. The immediate exercise of the power is entrusted to responsible ministers who would act unreasonably at their peril. There is now no need to apprehend any such arbitrary interference with trade on the part of the Crown as gave rise to *Bates' Case.* (1) The fact that a general power is liable to be unreasonably exercised affords no reason for declining to treat the power in question as a general power. Even a limited power is liable to be unreasonably exercised. A general power of this kind may be given to the executive to be used only in special emergencies: *Theodore* v. *Duncan.* (2)

In construing s. 43 the general words "any other goods" should be understood in their natural and literal meaning, and should not be limited to goods ejusdem generis with those designated by the particular words "arms, ammunition, gunpowder," which precede them: *Richmond Hill Steamship Co.* v. *Trinity House Corporation* (3); *Anderson* v. *Anderson* (4); *Reg.* v. *Payne* (5); and *Cairn Line of Steamships, Ld.* v. *Trinity House Corporation.* (6) The rule applied in these cases has not been weakened by any of the later cases. In *Hunter* v. *Coleman* (7), in which s. 43 itself came in question, the judges on the whole inclined to the view that the meaning of the general words ought not to be restricted.

Even if, in construing s. 43, the general words "any other goods" should be limited to goods ejusdem generis with those previously mentioned, that is to say, to goods useful in war, the section would still be sufficiently wide to authorize the Proclamation in question, at all events in so far as it prohibits the importation of pyrogallic acid, which as the evidence shows is used chiefly in photography, an art now

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(1) (1606) Lane, 22; 2 St. Tr. 371.
(2) [1919] A. C. 696.
(3) [1896] 2 Q. B. 134.
(4) [1895] 1 Q. B. 749.
(5) (1866) L. R. 1 C.C. 27.
(6) [1908] 1 K. B. 528.
(7) [1914] 2 I. R. 372.

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absolutely indispensable in war, and is capable of being used in the manufacture of explosives and poisonous gas.

Further, the Proclamation in question is not invalid on the ground that it grants a "dispensation" in contravention of the Bill of Rights of 1688 (1 W. & M., sess. 2, c. 2), s. 12, which provides that "no dispensation by *non obstante* of or to any statute, or any part thereof, shall be allowed, but the same shall be held void and of no effect." The clause in the Proclamation which provides that the prohibition shall not apply to the goods mentioned in it which are imported under licence of the Board of Trade, does not dispense with any statute or rule of law; but merely sanctions the granting by a responsible authority of a licence to an individual in a particular case.

R. A. Wright K.C. and *James Wylie* for the defendant. The defendant is entitled to import the pyrogallic acid in question, and it ought not to be forfeited. The Prohibition of Import (No. 32) Proclamation, 1919, which is said to prohibit the importation of the goods, is invalid.

First, the Proclamation, which could not have been made except under s. 43 of the Customs Consolidation Act, 1876, is not authorized by that section. On its true construction that section only gives the Crown power to prohibit the importation of the goods specifically mentioned in the section, namely, arms, ammunition, and gunpowder, and other goods belonging to the same genus of articles useful chiefly in war, and does not give it a general power of prohibiting the importation of goods of any kind and thereby enable it to make such a Proclamation as this prohibiting the importation of chemicals of all descriptions. The section does not give the Crown the general power which it claims of prohibiting all imports if it be construed according to the principles of the common law. At common law trade is free, and cannot be restrained by the Crown in virtue of its prerogative, but only by Act of Parliament: Chitty on the Prerogatives of the Crown, ed. 1820, pp. 163, 165. "The King might not, without an Act of Parliament, restrain the importation or exportation of goods to particular ports; and the reason is, because regularly all publick ports are free and juris publici": Hargrave's Law Tracts, ed. 1787, p. 99, Part II., chap. 10. At common law a Proclamation prohibiting the import of a particular kind of goods from another country under pain of forfeiture is void: Comyns' Digest, vol. vii., p. 48, Tit. Prærogative, D. 3*a*. At the commencement of the prefatory note to the report in the State Trials of *Bates' Case* (1) the attempt of the Crown to interfere with trade which gave rise to that case is described as a "rash and unwarrantable scheme."

The section does not give the Crown a general power of prohibiting all imports if it be construed according to the canons of construction which are applicable to it. As the section authorizes the prohibition of the importation of certain goods by means of penalties and forfeitures, the canon applies to it that a penal section must be strictly construed, and the narrower interpretation of it should therefore be preferred. "Unless penalties are imposed in clear terms they are not enforceable. Also, where various interpretations of a section are admissible, it is a strong reason against adopting a particular interpretation if it shall appear that the result would be unreasonable or oppressive": per Lord Loreburn in *Attorney-General* v. *Till.* (2) Another canon applicable to the section is that in all doubtful matters an enactment which is in general terms is to receive such a construction as may be agreeable to the rules of the common law in cases of that nature: per Trevor C.J. in *Arthur* v. *Bokenham* (3); and the section ought therefore to be construed according to the appropriate rule of the common law which, as already stated, is that all imports are free unless restrained by statute. The case of *Theodore* v. *Duncan* (4) is distinguishable, because there the statute in question did in clear and precise terms give the executive power to make a Proclamation extending its provisions.

Another of these rules is that in construing a provision in a statute regard may be had to the other provisions of the

(1) 2 St. Tr. 371.
(2) [1910] A. C. 50, 51.
(3) (1707) 11 Mod. 148.
(4) [1919] A. C. 696.

statute. If s. 43 of the Act of 1876 be read in relation to the other provisions of the Act it appears that it cannot be intended to give to the Crown a general power of prohibiting all imports. The first section relating to imports is s. 39, which provides that it shall be lawful to import any goods, which are not by law prohibited to be imported. Sect. 42, which prohibits or restricts the importation of certain goods, is not inconsistent with that previous section, because the prohibitions and restrictions which it imposes are limited to particular goods and are imposed not in order to hamper trade, but in the interest of public health or morals. If s. 43 gave to the Crown an unlimited power of prohibiting all imports it would be at variance with the general purpose of these sections, but if, as the defendant contends, it only gives the Crown a limited power to prohibit certain goods used chiefly in war it is not inconsistent with that purpose. If it had been intended to give to the Crown an extensive power of prohibiting the importation of many kinds of goods, s. 43 would have specified these goods, as s. 138 specifies the goods which the Crown may prohibit from being exported.

Another of these canons of construction is that the use of general words in a statute does not preclude inquiry into the object of the statute or the mischief which it was intended to remedy: per Lord Halsbury L.C. in *Cox* v. *Hakes.* (1) It appears from the history of this legislation that the object of the Act of 1876 is entirely inconsistent with the view that s. 43 gives to the Crown the general power which it here claims. The Act of 1685 (1 Jac. 2, c. 8), s. 2, directly prohibited the importation by way of merchandise of gunpowder, arms, ammunition, and utensils of war. Each of the Customs Acts of 1825, 1833 and 1845 directly prohibited the importation either absolutely or under restrictions of various sorts of goods of which lists were given beginning with arms, ammunition and utensils of war, and including also gunpowder. The Customs Consolidation Act, 1853, which inaugurated the policy of free trade, introduced a new system,

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(1) (1890) 15 App. Cas. 506.

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first declaring it lawful to import any goods not by law prohibited, then directly prohibiting or restraining the importation of certain particular goods, and finally giving the Crown the power of prohibition now in question. That Act has been re-enacted by the Act of 1876. The main purpose of the latter Act in regard to imports is expressed in s. 39, which declares that it shall be lawful to import any goods which are not by law prohibited to be imported. This being the policy of the Act, it cannot have been intended that s. 43 should give to the Crown a general power of prohibiting the importation of all goods. The section in adopting the words "arms, ammunition, gunpowder," constitutes a class of articles the importation of which it had all along been recognized that it might at times be important to prevent in order to secure the peace of the realm, and the subsequent words "any other goods" are meant to be limited to things of the same class. In all the earlier Acts the provisions for prohibiting exports were wider than the provisions for prohibiting imports, and it cannot be supposed that in this Act the section relating to the prohibition of imports (s. 43), was intended to be of greater scope than the wide section relating to the prohibition of exports (s. 138). Since the Act of 1876 came into force the list of articles which the Crown is empowered to prohibit from being exported has from time to time been extended, as by the Exportation of Arms Act, 1900 (63 & 64 Vict. c. 44), and the Customs (Exportation Prohibition) Act, 1914 (4 & 5 Geo. 5, c. 64), and if the list of articles prohibited from being imported were found to be too restricted, it would be easy to extend it in the same manner.

Another canon of construction of a more special character, which is applicable to s. 43, is the rule of ejusdem generis. As the particular words of the section "arms, ammunition, gunpowder," clearly indicate a genus of things serviceable in war, the general words "any other goods" must be restricted to things of that genus, and must not be understood in their literal meaning, since to give them that meaning would be equivalent to striking out the particular words which were presumably intended to have a definite meaning :

see *Tillmanns & Co.* v. *S. S. Knutsford* (1); S. C. affirmed nom. *S. S. Knutsford* v. *Tillmanns & Co.* (2); *Fuller* v. *Blackpool Winter Gardens and Pavilion Co.* (3); *In re Stockport Ragged, Industrial and Reformatory Schools* (4); and *James Nelson & Sons* v. *Nelson Line (Liverpool), (No. 2).* (5) The case of *Hunter* v. *Coleman* (6) tends to some extent to support the same view. As to the cases of *Reg.* v. *Payne* (7) and *Richmond Hill Steamship Co.* v. *Trinity House Corporation* (8), which were cited on this point on behalf of the Crown, the particular words in the sections there in question clearly indicated a genus, and it was not necessary to construe the general words more widely than as meaning things ejusdem generis in order that they should include the things in question in these cases. Sect. 43 does not in clear and unambiguous terms make the executive the donee of a general power to prohibit the importation of all goods.

That the Crown itself regards the power given to it by s. 43 as of a special and emergency character is shown by the fact that all the proclamations which it has made under that section have been made during the European war.

Secondly, the Proclamation in question is illegal and void, inasmuch as, in providing that it shall not apply to any of the goods prohibited by it which are imported under licence by the Board of Trade, it unlawfully gives to the executive a dispensing power or power of evading its provisions. Sect. 43 gives to the Crown power to prohibit the importation of certain goods, but no power to grant a licence dispensing with the prohibition. The Crown cannot grant a dispensation or licence contrary to law: Bill of Rights, 1688 (1 W. & M. sess. 2, c. 2), s. 12; Blackstone's Commentaries, i. 142, 186; Comyns' Digest, vol. vii., p. 50, Tit. Prærogative, D. 7; and *Shiffner* v. *Gordon.* (9) The Proclamation must be taken as a whole and is not severable, and as it contains an illegal power to license it is void in its entirety.

(1) [1908] 2 K. B. 385.
(2) [1908] A. C. 406.
(3) [1895] 2 Q. B. 429, 433.
(4) [1898] 2 Ch. 687.
(5) [1907] 1 K. B. 769.
(6) [1914] 2 I. R. 372.
(7) L. R. 1 C. C. 27.
(8) [1896] 2 Q. B. 134.
(9) (1810) 12 East, 296.

Giveen in reply. There are grounds for believing that the Crown had at common law a prerogative to regulate commerce. In Chitty's Prerogatives of the Crown, p. 163, the Crown's lack of that prerogative appears to be attributed to the fact that there are statutes binding it, which would seem to imply that the Crown has the prerogative at common law and is only prevented from exercising it by statute. In *Bates' Case* (1) it is stated that "no exportation or importation can be but at the King's ports, they are the gates of the King, and he hath absolute power by them to include or exclude whom he shall please." In Anson's Law and Custom of the Constitution (ed. 1911), vol. i., p. 338, it is observed that the decision in that case in favour of the Crown "violated the spirit of the constitution rather than the letter of the law." The Crown occasionally assumed to exercise this prerogative, and did so with beneficial results. In 1766 it laid an embargo on the exportation of corn which admittedly saved the people from famine, yet very shortly afterwards the embargo was declared illegal by the statute 7 Geo. 3, c. 7: see Chitty's Prerogatives of the Crown, p. 164. Instead of the emergency power which the Crown then exercised of prohibiting exports, s. 138 of the Act of 1876 has given it a wide discretionary power of doing so by Proclamation or Order in Council, and, similarly, s. 43 should be construed as giving it a general discretionary power of prohibiting imports. The observations which were cited from the judgment of Lord Loreburn in *Attorney-General* v. *Till* (2) related to a penal statute, and are not applicable to s. 43, which does not impose any penalty. The ejusdem generis rule ought not to be applied to the construction of s. 43. The true principle of construction applicable to a statute, in which particular words are followed by general words, is not that the general words are to be restricted to the genus indicated by the particular words, but that the words are to be construed according to the intention of the Legislature, which is taken to be in accordance with the necessities of the case, and with sound reason: *Stradling* v. *Morgan* (3), cited with approval by Lord Halsbury L.C. in

(1) Lane, 22, 27. (2) [1910] A. C. 50, 51. (3) (1560) Plowd. 199, 205*a*.

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Cox v. *Hakes*. (1) Similarly, the principle applicable in the case of written documents is to reach the meaning of the parties through the words which they have used: *Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.* (2) The ejusdem generis rule is highly artificial, and is for the most part confined to the construction of commercial documents. In *Tillmanns & Co.* v. *S. S. Knutsford,* (3) it is recognized that the chief artificial rule applicable in such cases is that the general words, notwithstanding that they follow particular words, must be given their natural meaning unless it appears from the instrument that they are to have a more limited meaning. There is nothing in the Act of 1876 to show that the general words in question are to have a limited meaning. In the last-named case reliance was placed upon *Reg.* v. *Cleworth* (4), but that was a case of a special type in which certain particular occupations were mentioned in a descending order of importance, and the true ground of the decision was that the general words which followed the particular words did not include an occupation of greater importance than those mentioned at the end of the particular series. *Fuller* v. *Blackpool Winter Gardens and Pavilion Co.* (5), is distinguishable, because in that case the meaning of the general words taken by themselves was not clear, whereas here it is quite clear. In *In re Stockport Ragged, Industrial and Reformatory Schools* (6) Lindley L.J. drew attention to *Anderson* v. *Anderson* (7), and did not dissent from that case. The reason why the Crown has only exercised its powers under s. 43 since the late war began is that until the war began there was no occasion for it to exercise these powers.

The fact that this Proclamation comprises a licensing power does not make it invalid. A dispensing or licensing power which purports to enable the donee to grant exemption from an absolute statutory prohibition is no doubt invalid, as was held in the cases mentioned in Comyns' Digest, vol. vii., p. 50, and in *Shiffner* v. *Gordon*. (1) Sect. 43, however, does not absolutely prohibit imports. Indeed no provision of any Customs Act has ever done so. Even those sections, such as s. 63 of the Act of 1845, which purport to prohibit absolutely the importation of certain goods, provide for a licence from the Crown. And the Customs (Exportation Restriction) Act, 1915 (5 & 6 Geo. 5, c. 52), s. 1, sub-s. 1, which empowers the Crown to prohibit the exportation of arms, contemplates provision being made for the granting of a licence. In the present case a licence, if granted, would not dispense with any statute, but only with the King's own Proclamation.

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(1) 15 App. Cas. 506, 518.

(2) (1887) 12 App. Cas. 484.

(3) [1908] 2 K. B. 385, 397, 399; affirmed [1908] A. C. 406.

(4) (1864) 4 B. & S. 927.

(5) [1895] 2 Q. B. 429.

(6) [1898] 2 Ch. 687.

(7) [1895] 1 Q. B. 749.

Dec. 17. SANKEY J. read the following judgment. In this case the Attorney-General, on behalf of His Majesty, asks for the condemnation and forfeiture of six cases of pyrogallic acid belonging to the defendant, John Brown. The facts are as follows :—

By a Proclamation known as the Prohibition of Imports (No. 32) Proclamation, 1919, and dated June 25 last, His Majesty, purporting to act under s. 43 of the Customs Consolidation Act, 1876, prohibited the importation into the United Kingdom of chemicals of all descriptions, unless under licence. Sect. 43 provides as follows : "The importation of arms, ammunition, gunpowder, or any other goods may be prohibited by Proclamation or Order in Council."

On August 29, 1919, an officer of His Majesty's Customs and Excise seized the six cases of pyrogallic acid which had been imported into Manchester by the defendant on board the steamship *Bovic* without any licence being given for the importation of the same. Correspondence thereupon took place between the officers of His Majesty's Customs and the defendant. The letters of September 1, 2, 16 and 18 show the position taken up by the parties, and are as follows. On September 1, 1919, the defendant wrote :—

"Sir,—We have received your notification of August 29 respecting the seizure of six casks of pyrogallic acid, ex s.s. *Bovic*, from New York. We would, however, point out to you that this acid was ordered by us from the Mallinckrodt Chemical Works, Montreal, Canada, on June 17, 1919, that is, *before* the Regulations were enacted under and by virtue of which you have seized the goods. In view of these facts, may we ask you to give entry, or state the reason why not? We would point out that we have paid the Mallinckrodt Chemical Company, of Montreal, in Canadian dollars, and it is obviously for their own convenience that they have shipped from New York instead of Montreal.—We are, Yours faithfully, for Brown and Forth. (Sgd.) ——."

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(1) 12 East, 296.

On September 2, 1919, the Officer of Customs replied:—

"Gentlemen,—Pyrogallic Acid and s.s. *Bovic* 19/328.—The entry lodged by the Mersey Weaver and Ship Canal Carrying Company, Limited, on your behalf, indicates that the consignors are the Mallinckrodt Chemical Company, New York, and that the goods were consigned from U.S.A. If you can produce invoice and other documentary evidence that the goods are of Canadian origin, I shall be in a position to release the consignment immediately.—Your immediate servant, W. BUCKLEY."

On September 16, 1919, again the Officer of Customs wrote:—

"Gentlemen,—In reply to your letter of the 11th instant addressed to the Officer of Customs and Excise at North Station, Manchester, I am directed by the Board of Customs and Excise to inform you that as a claim to the consignment of pyrogallic acid in question has been made on behalf of Messrs. Brown and Forth, proceedings will be taken in the High Court for condemnation of the goods in accordance with the provisions of section 207 of the Customs Consolidation Act, 1876, of which you will receive due notice.

"I may, however, observe that, by virtue of an open general licence issued by the Board of Trade, goods shown to the satisfaction of the Board of Customs and Excise to have been exported from and manufactured in any part of H.M. Dominions are exempt from import prohibition.

"Your clients claim that the goods in question fall within the terms of this general licence, having been ordered from the Mallinckrodt Chemical Works, Montreal, but they have so far produced no evidence in support of their statement, while the goods have in fact reached this country from New York, the name of the consignors being stated as the Mallinckrodt Chemical Company, New York. This aspect of the case is not referred to in your letter, but it is still open to your clients to obtain delivery of the goods in question under this general licence on production of satisfactory evidence of consignment and origin.—I am, gentlemen, your obedient servant, H. C. TROTTER.

"Messrs. Stephenson, Harwood and Co., 31, Lombard Street, E.C.3."

On September 18, 1919, the defendant's solicitors replied :

"Dear Sir,—*Brown* v. *Buckley*.—In further reply to your letter of the 16th inst., the plaintiff is unable to give any such evidence as you ask for in respect of the origin of the goods, and for the purposes of these proceedings you may assume that they are of American origin, and therefore not within the terms of the general licence to which you refer. With reference to paragraph 8 of our clients' affidavit, stating they had received no reply to their letter, we have, of course, since received your letter of the 16th inst., already acknowledged.—Yours faithfully, Stephenson, Harwood and Co.

"H. C. Trotter, Esq., Customs House, E.C.3."

Proceedings were then commenced, as above stated, the Attorney-General asking for forfeiture of the goods and the defendant taking up the position that the Proclamation under which the King purported to act is of no legal force and effect, and that he had no power to make it.

The argument on behalf of the Crown is that the words in s. 43 mean what they say, and that His Majesty is entitled to prohibit the import of goods of every sort and description into this country.

On behalf of the defendant it is contended : (1.) That the familiar rule of construction known as the doctrine of ejusdem generis should be applied to s. 43—that is to say, that general words following particular words should be narrowed in their meaning, and that the section should be read so that the general words may be construed to mean "goods of the sort or kind of arms, ammunition, and gunpowder." (2.) That in any event the Proclamation is bad because of the exercise of a dispensing power—that is to say, that there is no right in His Majesty to make exceptions. He can prohibit goods altogether, but he cannot prohibit goods from one country while allowing them to be imported from another.

It is well known that His Majesty acts upon the advice of the Executive, and in order that there may be no misapprehension upon the subject it is desirable to state that the acts of His Majesty in this case are really the acts of the Executive. It is also right to point out quite definitely that it is not the present Government who initiated this prohibition of imports by Proclamation, nor is it they alone who have claimed the right to do so. This practice has sprung up since the war began, and the Proclamation in question is, in fact, the thirty-second of its kind. It was, however, stated at the Bar that from the time the section was first enacted in 1853 down to about 1915 no Government ventured to issue any such Proclamation in pursuance of this section. The usage which has recently sprung up cannot be relied on. During a war practices are pursued which would not be tolerated in peace, and every man willingly undertakes onerous and distasteful tasks, or forgoes the exercise of undoubted rights, for no other reason than a desire to help his country at a crisis.

The learned Attorney did not shrink from the consequences of his argument. He admitted that if it was correct it was open to the Executive, on their own motion, to prohibit the importation of corn and meat into this country entirely, or, at any rate, to prohibit the importation of corn, meat, and other articles from certain countries while allowing them to come in free from other countries. His answer was that it was easy to put cases which were grotesque, but that it must

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be assumed that where a discretion is left in the hands of the donee of a power it was thought and considered that the donee would exercise it reasonably. This argument appears to beg the question, which is not whether the donee would exercise a power reasonably, but whether he has the power at all, and upon such an issue it is not immaterial to consider the magnitude of the power alleged to be conferred.

The case turns upon the construction of s. 43, and in construing an Act of Parliament it is, in my view, legitimate to consider (1.) the state of the law at the time the Act of Parliament was passed, and the changes it was passed to effect ; (2.) the sections and structure of the Act of Parliament as a whole : see *Stradling* v. *Morgan* (1), where it is said, " The judges of the law in all times past have so far pursued the intent of the makers of statutes, that they have expounded Acts which were general in words to be but particular where the intent was particular. . . . The sages of the law heretofore have construed statutes quite contrary to the letter in some appearance, and those statutes which comprehend all things in the letter, they have expounded to extend but to some things, ... which expositions have always been founded upon the intent of the Legislature, which they have collected sometimes by considering the cause and necessity of making the Act, sometimes by comparing one part of the Act with another, and sometimes by foreign circumstances. So that they have ever been guided by the intent of the Legislature, which they have always taken according to the necessity of the matter, and according to that which is consonant to reason and good discretion " ; and see also *Heydon's Case* (2) and *Hawkins* v. *Gathercole* (3), per Turner L.J., where he says (3) : "In determining the question before us, we have therefore to consider not merely the words of this Act of Parliament, but the intent of the Legislature, to be collected from the cause and necessity of the Act being made, from a comparison of its several parts, and from foreign (meaning extraneous) circumstances, so far as they can justly be considered to throw

(1) Plowd. 199, 204, 205.
(2) (1584) 3 Rep. 7, 8.
(3) (1855) 6 D. M. & G. 1, 21, 22.

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light upon the subject." Bearing these canons of interpretation in mind, it is necessary to consider whether the argument of the Attorney-General that the Executive have absolute power to prohibit imports is correct, or whether I have to hold that the narrower construction of the section contended for by the defendants is the right one.

As to (1.). The state of the law at the time the Act of Parliament was passed and the changes it was passed to effect. The Customs Consolidation Act of 1876 re-enacts, as far as the sections material to this case are concerned, an earlier Act of 1853, known as the Customs Act, 1853 (16 & 17 Vict. c. 107), and it is therefore to the position in the year 1853 that attention must be directed. Considerable argument was addressed to me as to the state of the King's prerogative at that period, in respect of trade and commerce. Reference was made to Lord Chief Justice Hale's opinion as set out in Hargrave's Law Tracts, Article "De Portibus Maris," chap. 9, ed. 1787, p. 97, concerning the jus regium in ports of the sea in relation to commerce and trade, where the learned author in the last paragraph says : "And thus I have passed through the consideration of the King's prerogative in ports, for their opening and shutting in relation to trade and commerce. And upon the whole matter, it will appear from the several Acts of parliament that have been made for the support and increase of trade, and for the keeping of the sea open to foreign and English merchants and merchandize, that there is now no other means for the restraint of exportation or importation of goods and merchandizes in times of peace, but only when and where an Act of parliament puts any restraint. Several Acts of parliament having provided, *que la mere soit overt*, it may not be regularly shut against the merchandize of English, or foreigners in amity with this Crown, unless an Act of parliament shut it, as it hath been done in some particular cases, and may be done in others."

In Mr. Justice Blackstone's Commentaries, Book I., ch. 7, Of the King's Prerogative, vol. i., p. 270, it is stated that the King's Proclamations are binding upon the subjects where they do not either contradict the old laws or tend to establish new ones; and Chitty on the Prerogatives of the Crown (1820), chap. 10, p. 165, sums up the situation by adopting the passage from Hargrave's Law Tracts which I have just quoted.

Now, although the battle of the King's prerogative had been fought during the Tudor and Stuart times, and although by the beginning of the 18th century the power of the King had been reduced within narrow and defined limits, "arms, ammunition, utensils of war, and gunpowder" had often during that period been put in a class by themselves for exceptional treatment, by Proclamation or Order in Council. For example, in 1660, by the statute 12 Car. 2, c. 4, s. 12, it is provided that "it shall be free and lawful for His Majesty at any time when he shall see cause to do so, and for such time as shall be therein expressed, by Proclamation, to prohibit the transporting of gunpowder, or any sort of arms or ammunition, into any parts out of this kingdom; anything in this Act contained to the contrary notwithstanding."

The reason for this may be found in an Act of 1756 (29 Geo. 2, c. 16), which is entitled "An Act to impower his Majesty to prohibit the Exportation of Salt Petre; and to enforce the Law for impowering his Majesty to prohibit the Exportation of Gunpowder, or any sort of Arms and Ammunition; and also to impower his Majesty to restrain the carrying coastwise of Salt Petre, Gunpowder, or any sort of Arms or Ammunition"; and provides by s. 1: "Whereas by an Act of Tonnage and Poundage made in the Twelfth year of the Reign of King Charles the Second, power is expressly reserved to his Majesty to prohibit, at and for such times as he should see cause, the transporting of gunpowder, or any sort of arms or ammunition, into any parts out of this Kingdom: And whereas salt petre is absolutely necessary to the making of gunpowder, and the publick safety may requre temporary restraints upon the exportation thereof, at critical conjunctures: Therefore to prevent all doubts, be it hereby declared and enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, That His Majesty may, by Proclamation or Order in Council, when he shall see cause, and for such time as shall be therein expressed, prohibit the exporting, or attempting to export, salt petre out of this Kingdom, in such manner and under such restraints as He shall think fit." Again, the words "arms, ammunition, and utensils of war" and "gunpowder" will be found placed together and treated alike in the Customs Act, 1825 (6 Geo. 4, c. 107, s. 52), in the Customs Act, 1833 (3 & 4 Will. 4, c. 52, s. 58), and in the Customs Act of 1845 (8 & 9 Vict. c. 86, s. 63), where their importation is prohibited except by licence from His Majesty for certain purposes.

This Act of 1845 marks the last days of a policy which had lasted for generations. During that period trade had been hampered by many Acts of Parliament, as, for example, the Navigation Acts and hundreds of Customs Acts. Among articles absolutely prohibited to be imported by the Act of 1825 were beef, lamb, mutton, pork, sheep and swine. But from 1845 onwards a great change came over the country, a change in the direction of free trade, and it was on August 20, 1853, that the Customs Act, 1853 (16 & 17 Vict. c. 107), was passed. It "rang out the old and rang in the new." It is the Magna Charta of Free Trade. It was re-enacted, as already stated, by the Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), and the material sections, as far as the present case is concerned, are ss. 41 to 45, which are replaced by ss. 39 to 43 of the later Act as regards imports, and s. 150 replaced by s. 138 of the 1876 Act, and subsequently by s. 8 of the Customs and Inland Revenue Act, 1879, as regards exports.

Sect. 41 definitely inaugurated the new era, and enacts, "it shall be lawful to import into the United Kingdom any goods which are not . . . . prohibited to be . . . . imported." Sect. 44 sets out two classes of goods, upon the first of which an absolute prohibition is placed, and upon the second restrictions are imposed. From it are omitted many articles previously prohibited. The important section (45), which is reproduced by s. 43 of the Customs Consolidation Act, 1876, under which the present proclamation is made, is in these terms: "The importation of arms, ammunition, gunpowder, or any other goods may be prohibited by Proclamation or Order in Council." It is contended by the Attorney-General that this gives a right to His Majesty by Proclamation or Order in Council to prohibit the importation of every conceivable sort of goods. Having regard to the history of and the circumstances under which the Act was passed, it is very difficult to follow this line of reasoning. It would be strange indeed at a time when the King's prerogative had been so carefully restricted, at a time when the desire of the country and the purpose of Parliament were to introduce a system of free trade as distinguished from a system of restricted trade, at a time when Parliament had started the enactment under s. 41 by saying that "it shall be lawful to import into the United Kingdom any goods which are not . . . . prohibited," that in a subsequent section, and by means of a few general words at the end of particular ones, they should hand over to the Executive the power to prohibit absolutely the importation of every sort of goods. No such power had existed previously, and it is almost impossible to think that it was meant to be conferred by the section in question. Could Parliament ever have intended at the moment of the birth of free trade to hand over to the Executive an absolute power to prohibit the importation of every and any article, and to do so by the addition of a few general words at the end of a category of particular goods? There would appear to be every reason why it should not do so, and no reason why it should. It therefore seems to me that the state of the law at the time when the Act was passed, and the changes it was passed to effect, throw a strong element of doubt upon the learned Attorney's contention.

(2.) As to the sections of and structure of the Act of Parliament as a whole. For years before the Act the importation of arms, ammunition, and gunpowder had been in a separate category, and had been prohibited to be imported except by licence from His Majesty for furnishing His Majesty's public stores only. When the Act of 1853 came to be passed the structure appears to have been as follows: Sect. 41 declares in favour of the lawful importation of any goods. Sect. 44 sets out three several tables—(*a*) in respect of goods absolutely prohibited to be imported; (*b*) goods prohibited to be imported except in transit; (*c*) goods prohibited to be imported, subject to restrictions.

Now it is to be noted that as far as this table is concerned it appears in the Acts of 1825, 1833, and 1845, but not quite in the same form. In each one of those Acts the words arms, ammunition, and utensils of war by way of merchandise, and gunpowder, found their place in the list of goods absolutely prohibited to be imported. They were logically in their wrong class because they were not really absolutely prohibited, for a licence could be obtained from His Majesty for their importation. The draftsman who drew the Act of 1853 evidently saw this. They were a well-known category of articles. They had been grouped together repeatedly in the earlier statutes, and evidently referred to a class of goods connected with warlike operations. He therefore logically took them out of a class to which they did not belong and dealt with them separately in a section. There were four articles in this class—(1.) arms; (2.) ammunition; (3.) gunpowder; (4.) utensils of war.

To some extent utensils of war was tautological because it would include arms and ammunition, and in my view the draftsman having written down arms, ammunition, and gunpowder, and wishing to include all other goods of that character which could be used as utensils of war, added the words "any other goods," so as to include arms, ammunition, gunpowder, or any other goods of that class which could be used as utensils of war.

It would therefore appear that the words "any other goods" in s. 43 are used in a restrictive meaning, and do not mean every other sort of goods, but any other goods of the kind referred to in the previous words.

The Attorney-General pressed upon the Court an argument based on the Export Section (150) of the Act of 1853, now s. 8 of the Act of 1879, but there the words are different and different considerations apply.

This being the result of an examination of the state of the law in 1853 and the structure of the Act passed in that year, I approach the question whether the doctrine of ejusdem generis should be applied to s. 43 of the Customs Consolidation Act, 1876. By this it is meant that general words coming after particular words are restricted to and controlled by the meaning of the particular words. The simplest statement of this doctrine is to be found in a judgment of Lord Campbell C.J. in *Reg.* v. *Edmundson* (1), where he says (2): "I accede to the principle laid down in all the cases which have been cited, that, where there are general words following particular and specific words, the general words must be confined to things of the same kind as those specified." The doctrine has been frequently applied to deeds, to charterparties, and to Acts of Parliament. It was recently applied to s. 62 of the Charitable Trusts Act, 1853, and the words " or other schools " were restricted to the meaning of the particular schools which were named immediately before them (3), and Lindley M.R. says: "I cannot conceive why the Legislature should have taken the trouble to specify in this section such special schools as cathedral, collegiate, and chapter, except to show the type of school which they were referring to, and, in my opinion, 'other schools' must be taken to mean other schools of that type." (4) It is quite unnecessary, and indeed it would be unprofitable to go through all the cases on this subject—their name is legion, and they will be found conveniently collected in Craies' Statute Law, 2nd ed. (1911), which is the 5th edition of Hardcastle on Statutory Law, at p. 182 and onwards. The doctrine is one which may easily be pressed too far. The Attorney-General cited the case of *Anderson* v. *Anderson* (5), where in construing a deed Lord Esher M.R. did not adopt the rule, but this case was explained by Farwell L.J. in *Tillmanns & Co.* v. *S. S. Knutsford* (1), where he says: "Unless you can find a category there is no room for the application of the ejusdem generis doctrine, and in *Anderson* v. *Anderson* (2) there really was no category at all." (3) *Tillmann's Case* (1), it is true, was a charterparty case. It was affirmed in the House of Lords. (4) In any event, for our present purpose it is more desirable to take the rule on the doctrine from a case which deals with Acts of Parliament rather than with deeds and charterparties.

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(1) (1859) 28 L. J. (M. C.) 213.

(2) Ibid. 215.

(3) *In re Stockport Ragged, Industrial, and Reformatory Schools* [1898] 2 Ch. 687.

(4) Ibid. 696.

(5) [1895] 1 Q. B. 749.

Although therefore the doctrine of ejusdem generis is to be applied with caution, where in an Act of Parliament there are strong reasons (*a*) from the history and circumstances connected with its passing, (*b*) from the structure of the Act itself, to indicate the real meaning of the Legislature, in my view the doctrine of ejusdem generis is one which not only can, but ought to, be applied. Further than that, in this particular case it may be urged that there is evidence in the section itself that the meaning of the general words is to be restricted. If it was desired to give the Executive an absolute prohibition in all cases, a power be it noted unprecedented and of the greatest magnitude, there would have been no need nor would it have been desirable to set out the words "arms, ammunition, gunpowder"; the object would have been achieved by simply saying the "importation of any goods may be prohibited by Proclamation or Order in Council." It is true that this argument may be said to cut both ways, but on reflection it does not appear to do so when one remembers what I conceive to be the object of taking the particular articles out of the category of absolutely prohibited goods and dealing with them by themselves. No judicial decision has been given in England upon these words, but I was referred to the Irish case of *Hunter* v. *Coleman* (5), where the section was discussed. The question before the Court was whether a Proclamation which prohibited the importation of arms into Ireland was good, and it was urged that it was bad because it was contended that His Majesty could not differentiate between parts of the United Kingdom. The Court in that case held that he was entitled to do so. It was urged that in coming to their conclusions the Irish judges had construed the words "any other goods" in this section as not being governed by the doctrine of ejusdem generis. If they so decided, it was, in my view, not necessary for the determination of the case, nor can I think their decision proceeded upon argument, but only upon the admission of counsel for the Crown in Ireland. This appears to me to be clear from the words in the dissenting judgment of Kenny J. (1) I desire here to express my respectful acknowledgment of the assistance I have received from a careful perusal of that judgment.

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(1) [1908] 2 K. B. 385.
(2) [1895] 1 A. B. 749.
(3) [1908] 2 K. B. 403.
(4) [1908] A. C. 406.
(5) [1914] 2 I. R. 372.

For these reasons I am of opinion that the ejusdem generis rule must be applied to the construction of s. 43, and that the meaning of the general words must be restricted to that of the particular words which precede them, and that "any other goods" means goods of the class of arms, ammunition, and gunpowder.

The Attorney-General then contended that even if the general words "any other goods" are controlled by the particular words arms, ammunition, and gunpowder, he is still entitled to succeed upon the ground that pyrogallic acid is in the same class as arms, ammunition, and gunpowder.

The facts admitted upon this point are as follows: Pyrogallic acid in its ordinary commercial use is a developer in photography—owing to its properties it takes up oxygen very easily. It is not the only developer, and photographs can be developed without it. It is made from tanning materials, and its ordinary use, apart from photography, is for hair-dyes and certain medicinal purposes. The Attorney-General was instructed to argue that as pyrogallic acid can be used in photography, and as photography is used in war, therefore pyrogallic acid is in the same class of goods as arms, ammunition, and gunpowder. In my view it would be straining language to give effect to this contention. It is

(1) [1914] 2 I. R. 372, 395.

hard to conceive any article which is not used in modern warfare or in the preparation of some article used therefor. It might as well be contended that bread or meat could be prohibited because, being used for the purpose of feeding the soldiers engaged in the field, they are in the same class as arms, ammunition, and gunpowder. In so far as it is a question of fact, I find that pyrogallic acid is not in the same class as the particular articles set out in the section.

Finally it must be remembered that s. 43 is a penal section, and should be construed strictly: *Tuck & Sons* v. *Priester* (1), where Lord Esher M.R. says: "We must be very careful in construing that section, because it imposes a penalty. If there is a reasonable interpretation which will avoid the penalty in any particular case we must adopt that construction. If there are two reasonable constructions we must give the more lenient one." (2)

In my view it would not be proper to hold that Parliament intended to impose the penalty demanded in this case by words which are uncertain and equivocal."

I have therefore come to the conclusion that His Majesty had no power to make the Proclamation in question, and that it is illegal and invalid.

Having come to this conclusion it is not necessary for me to deal with Mr. Wright's second point—namely, that the Proclamation is bad because of the dispensing power.

My judgment is against the Crown and for the defendant, and the Crown must pay the costs.

Judgment for defendant.

Solicitor for the Crown: *The Solicitor for the Customs and Excise.*

Solicitors for defendant: *Stephenson, Harwood & Co.*

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(1) (1887) 19 Q. B. D. 629.

(2) Ibid. 638.

J. R.

CURRIE, APPELLANT *v.* COMMISSIONERS OF INLAND REVENUE, RESPONDENTS.

1919
Dec. 18.

Revenue—Excess Profits Duty—Exception—Profession—Divisibility of Business—Income Tax Repayment Agency—Payment by Commission—Finance (No. 2) *Act,* 1915 (5 *&* 6 *Geo.* 5, *c.* 89), *ss.* 38, *sub-s.* 1, 39.

By s. 38 of the Finance (No. 2) Act, 1915, excess profits duty is charged on the amount by which the profits arising from any trade or business to which Part III. of the Act applies exceeds the pre-war standard of profits as defined by the Act.

By s. 39: "The trades and business to which this Part of this Act applies are all trades or businesses.... of any description.... excepting—

. . . .

"(*c*) Any profession the profits of which are dependent mainly on the personal qualifications of the person by whom the profession is carried on and in which no capital expenditure is required, or only capital expenditure of a comparatively small amount, but including the business of any person taking commissions in respect of any transactions or services rendered. . . ."

The appellant had been carrying on the business of an income taxpayers' repayment agency, and doing the ordinary work of an accountant for upwards of twenty years. He was not a chartered accountant, nor a member of any organized professional body. He had however employed a chartered accountant as a member of his staff. He specialized in income tax, assisting persons in the preparation of their income tax returns and claims for repayment of income tax, and advised taxpayers on general income tax and excess profits duty questions.

He was paid by way of fixed fees for his accountancy work and for a portion of his income tax and excess profits duty work. For his services, however, in connection with income tax, etc., matters—and particularly as regards claims to relief from, or for repayment of, income tax—the appellant had frequently charged a percentage of the amounts discharged or recovered from the revenue authorities. The percentage charges in 1914 amounted to something like one-fourth and in the year 1916 to two-thirds of the appellant's total receipts. Little or no capital was required in carrying on the business. He had occasionally advertised:—

Held: (1.) that the appellant was carrying on a profession within the exception (*c*) of s. 39 of the Finance (No. 2) Act, 1915; (2.) that his business was indivisible; and (3.) that looking at his business as a whole he was not a person "taking commissions in respect of any transactions or services rendered" within the third limb of s. 39, and that he was therefore not liable to excess profits duty.

Commissioners of Inland Revenue v. *Maxse* [1919] 1 K. B. 647 commented on.

CASE stated under the Finance (No. 2) Act, 1915, s. 45, sub-s. 5, and the Taxes Management Act, 1880, s. 59, by the

Commissioners for the Special Purposes of the Income Tax Acts.

At meetings of the Special Commissioners held on November 20, 1917, and May 31, 1918, for the purpose of hearing appeals, the appellant, Currie, carrying on business as "The Income Taxpayers' Appeal Agency," appealed against an assessment to excess profits duty in an "estimated" sum of 296*l.*—in the absence, at the time, of accounts—for the accounting period commencing on January 1, 1916, and ending on December 31, 1916, less 44*l.* deficiency in the prior accounting periods—namely, 252*l.* net duty charged, made upon him by the Commissioners of Inland Revenue under the provisions of Part III. of the Finance (No. 2) Act, 1915, and subsequent enactments. There was no dispute as to figures, the sole ground of appeal being that the appellant claimed that he came within the exemption from excess profits duty accorded by s. 39, exception (*c*), of the Finance (No. 2) Act, 1915, in the case of "any profession the profits of which are dependent mainly on the personal qualifications of the person by whom the profession is carried on and in which no capital expenditure is required, or only capital expenditure of a comparatively small account."

The following facts were proved or admitted.

The appellant has been carrying on the business of the Income Taxpayers' Appeal Agency and doing the ordinary work of an accountant for upwards of twenty years.

He is not a chartered accountant, nor a member of any organized professional body. He has, however, from time to time employed a chartered accountant as a member of his staff, and a chartered accountant was in fact in his service during a substantial part of the accounting period under consideration and for a considerable period previously thereto.

He specialises in income tax, assisting persons in the preparation of their income tax returns and claims for repayment of income tax and advises taxpayers on general income tax and excess profits duty questions.

He is paid by way of fixed fees for his accountancy work and for a portion of his income tax and excess profits duty work.

For his services, however, in connection with income tax, etc., matters—and particularly as regards claims to relief from, or for repayment of, income tax—the appellant has frequently charged a percentage of the amounts discharged or recovered from the Revenue authorities by way of repayment, as the case may be.

The percentage charges in the year 1914 amounted to something like one-fourth and in the year 1916 to two-thirds of the appellant's total receipts.

Little or no capital is required in carrying on the appellant's business. The appellant has occasionally advertised.

It was contended on behalf of the appellant :—

(*a*) That the work carried on was a profession.

(*b*) That no capital was employed by the appellant, and that the profits of his whole work were dependent on his personal qualifications.

(*c*) That the assessment should be discharged. Alternatively it was contended that in any event that part of his earnings which arose from work paid for by fixed fees or from audits and pure accountancy work should be excluded from the pre-war and accounting period of profits respectively.

On behalf of the respondents, the Commissioners of Inland Revenue, it was contended (inter alia) :—

(*a*) That the appellant was carrying on a trade or business, and that the exception (*c*) to s. 39 of the Finance (No. 2) Act, 1915, did not apply to his case.

(*b*) That in any event the appellant was brought back into charge by the words in the last paragraph of the section.

(*c*) That the assessment should be increased to 611*l.* less 62*l.* balance of deficiency in prior accounting periods.

Having considered the whole of the facts and contentions as herein set out, the Special Commissioners were of opinion that the appellant came within the charge to excess profits duty, and they accordingly increased the assessment to the sum of 611*l.* less 62*l.* balance of deficiency in prior accounting periods—namely, 549*l.* net duty.

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Latter for the appellant. The appellant was carrying on a profession within the meaning of exception (*c*) in s. 39 of the Finance (No. 2) Act, 1915, and is therefore exempt from the excess profits duty imposed by s. 38. An accountant was assumed to be carrying on a profession in *Society of Accountants and Auditors* v. *Goodway* (1) and a schoolmaster in *Inland Revenue Commissioners* v. *North and Ingram.* (2) A person carries on a profession if he gives professional advice as distinguished from commercial advice. The appellant is wholly exempt from excess profits duty, but if he is liable on that portion of his income which is derived from commissions there ought to be an apportionment. It is clear from *Inland Revenue Commissioners* v. *Maxse* (3) that profits derived from purely professional work paid for by fees are not liable to excess profits duty. If a profession is being carried on, the mere fact that payment for the work is by commission does not bring it back into the section. In the General Order made under the Solicitors' Remuneration Act, 1881 (44 & 45 Vict. c. 44), the scale of remuneration is in terms referred to as commission. In *Burt* v. *Inland Revenue Commissioners* (4) it was not suggested that a professional man's income was brought back into s. 39 merely because it was paid by way of commission except by Scrutton L.J., whose dictum was obiter and ought not to be followed. The word "business" in the latter part of s. 39 cannot mean any business or profession whatever. The wide meaning the word "business" bears in the first limb of s. 39 cannot be carried through into the last limb. The last limb of s. 39 was put in for greater precaution in order to include something which might possibly be doubtful under the preceding parts of the section, as for instance whether a commission agent's business was included, and it was accordingly brought in expressly in the last clause of the section.

Assuming the appellant is carrying on a profession which is within exception (*c*) contained in s. 39, the profession is not brought back into the section under the last limb merely because the appellant is remunerated by commission.

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(1) [1907] 1 Ch. 489.
(2) [1918] 2 K. B. 705.
(3) [1919] 1 K. B. 647.
(4) [1919] 2 K. B. 650.

[*Robbins* v. *Inland Revenue Commissioners* (1) was also referred to.]

T. H. Parr for the respondents. It is clear from *Burt* v. *Inland Revenue Commissioners* (2) that any profession where the remuneration is by way of commission is included in s. 39 of the Finance (No. 2) Act, 1915. The word "commissions" in the last clause of s. 39 means ordinary commercial commission, and therefore does not include the solicitors' scale fee allowed by the General Order made under the Solicitors' Remuneration Act, 1881. The appellant is, but a solicitor is not, paid a commission on a profit made by his client. The solicitor is simply paid a scale fee allowed by the order. The question whether the appellant carried on a profession is one of fact. The Special Commissioners had all the facts before them and decided against the appellant. He is bound by their finding. They either found that he did not carry on a profession or that, if he did, it was brought back into s. 39 because he was paid by commission. A commission in a business sense is a remuneration in terms of percentages on profits of business done. It is the remuneration of an agent who is not paid a fixed sum: *Barker* v. *Inland Revenue Commissioners.* (3) It is as impossible to segregate the appellant's profits as it was in that case. The comparatively small amount of the appellant's fixed fees ought to be disregarded.

Latter in reply. The appellant cannot be said to be an agent within the meaning of s. 39. The character of a business is the test in considering whether it is included in s. 39, not the method of remuneration.

ROWLATT J. In this case the question is whether the appellant, who carries on the business of an income tax repayment agency, is chargeable to excess profits duty. Sect. 39 of the Finance (No. 2) Act, 1915, governs the matter, and it has been held by the Court of Appeal that the third limb of that section operates as an exception upon the exception contained in clause (*c*) of the second limb, and I think the law is definitely laid down in that sense. It might perhaps have been worth consideration whether, what may be called the counter-exceptions, including that of the commercial traveller, were not rather more in the nature of caveats or explanations than precise exceptions, but I think it has been decided that they are precise exceptions. The appellant carries on an accountancy business, the business of an income tax repayment agency, and does a certain amount of advisory work. How far he advises on nice questions of law does not appear, but he advises persons as to their position, and in many cases there is no necessity for any claim or abatement. In a great many cases, and they appear to have increased of late years, abatements or repayments are obtained through the appellant's efforts. The Special Commissioners, without saying whether they hold him to be exercising a profession, or whether, although exercising a profession, they nevertheless hold him to be a person carrying on the business of a person taking commissions, have held him liable.

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(1) [1920] 1 K. B. 51.

(2) [1919] 2 K. B. 650.

(3) [1919] 2 K. B. 222.

It seems to me that, upon the facts, he carries on a profession. I do not think that in the present case that is a question of fact. It is not a question of degree or anything of that kind. I have all the facts before me and it becomes a question of law. The appellant is in my judgment carrying on a profession which is a purely intellectual occupation, dealing with figures, as to which he has experience and knowledge, and I cannot doubt, in short, that what he does is professional work within the meaning of this section.

There remains the question whether he is not a person taking commissions in respect of transactions or services rendered. If I hold that he is, the question will arise whether his business can be divided as Mr. Maxse's business was. I do not think that it was decided in *Maxse's Case* (1) that the entries in a person's book in which he keeps the record of his takings can be examined, certain items struck out as being professional, and others retained as being non-professional. I think that in order to justify a distinction being made between two parts of a business there must be the circumstance which was present in Mr. Maxse's case—namely, a man filling two distinct characters, with two distinct aspects of his work. Mr. Maxse was a writer and journalist, and, on the other hand—which was entirely distinct—he managed the magazine in which as a matter of fact he published his own writings.

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(1) [1919] 1 K. B. 647.

On the facts in the present case I do not think I could possibly split the appellant's business into two, and I have therefore to decide whether he is carrying on a profession merely or whether it is a profession which is also a business involving taking commissions in respect of transactions or services rendered. This is rather a troublesome point. There may be a commission which is received by an agent who sells on commission, or who introduces business. But in the present case the commissions are received in respect of amounts recovered in cases where there is—I will not say a dispute—but an application made to the Revenue authorities for a refund or an allowance. There are other cases, such as that of a solicitor, where there is a scale fee, and an architect, whose fee depends upon the value of the building he designs; those are both cases in which I should shrink very much from holding that it was a business of a person taking a commission within the meaning of the section. The present case is more difficult because the percentage attaches to sums received or credited by way of benefit to the person whom the appellant serves. But upon the whole I have come to the conclusion that the appellant is not within the class of persons taking commissions within the meaning of the section not so much because any particular transaction might not involve taking a commission, but because the appellant's business, being indivisible, must be looked at as a whole. It is quite true that in recent years that part of his receipts which is derived from commissions has amounted to two-thirds of the total, but I do not think that that is the real test. Undoubtedly at the present time, when income tax is so high

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Rowlatt J.

and abatements are so complicated and extensive, a great deal is done in that way. But in substance I do not think the appellant's business depends upon commissions. I think he is an income tax repayment agent, and although in some cases he is paid by commission, and those cases happen to be a large proportion of his business at the present time, that is not the characteristic of his business as a whole, and I can think of no better test than that. I do not regard my decision—I do not think I should regard any decision upon this section—as entirely satisfactory. One sees the lack of firm ground to stand upon. One can only do one's best in each case, and, upon the whole, I think the appellant is entitled to succeed, and the appeal will therefore be allowed with costs.

Appeal allowed.

Solicitors for appellant: *Fraser & Christian.*
Solicitor for respondents: *Solicitor of Inland Revenue.*

J. E. A.

1920
Jan. 12.

In re TABOR.

Ex parte CORK.

Bankruptcy—Reputed Ownership—Possession, Order and Disposition of Bankrupt—Wholesale Grocery Trade—Custom of Hiring Furniture—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 38, *sub-s.* 1 (*c*).

The custom of hiring furniture which exists in the case of hotel proprietors, and is so notorious as to exclude the doctrine of reputed ownership in the event of the bankruptcy of the hotel proprietor whether the particular furniture was hired or not, does not extend to furniture in the possession of traders generally, e.g., a wholesale grocer.

Ex parte Emerson, In re Hawkins (1871) 41 L. J. (Bk.) 20, not followed.
Ex parte Turquand, In re Parker (1885) 14 Q. B. D. 636, applied.

MOTION on behalf of W. H. Cork, the trustee in bankruptcy of the debtor, Tabor, who traded as G. Tabor & Co., for, inter alia, a declaration that certain furniture, of which the respondent, H. A. G. Sorrell, was the owner and which at the commencement of the bankruptcy was on the business premises of the bankrupt, 37, King William Street, London, was in the possession, order or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner thereof, and formed part of the property of the bankrupt divisible amongst his creditors.

Before April 11, 1919, a company named Sorrell & Co., Ld., of which the respondent was substantially the proprietor, traded for a few weeks at 37, King William Street, as wholesale grocers under the management of one T. Parker Stanbank. On that date the debtor and Mrs. Stanbank, the wife of T. Parker Stanbank, took over the premises and bought stock from the respondent at the price of 1164*l*. 6*s*. 6*d*., payable by three bills of 388*l*. 2*s*. 2*d*. each at one, two, and three months from that date respectively. The respondent also entered into with the debtor on the same date a hire-purchase agreement relating to the office furniture, the subject-matter of the motion, which was then on the premises, for which the debtor agreed to pay 100*l*. by monthly instalments of 4*l*.

By cl. 1 of the hire-purchase agreement of April 11, 1919, it was provided that upon payment by Tabor & Co. (therein called the hirer) to Sorrell (therein called the owner) of 100*l*. by instalments of 4*l*. per month, the first instalment to be paid on the signing of the agreement and each subsequent instalment on the first day of each succeeding month, the goods should become the property of the hirer.

By cl. 2 it was provided that in default of the punctual payment of any hire instalment, or if the goods should be removed without the consent in writing of the owner, or if the hirer should be adjudicated bankrupt, or if a receiving order should be made against them, or if they should execute a deed of assignment or call a meeting of or compound with their creditors, the instalments previously paid should be forfeited to the owner, who should thereupon and without prejudice to his right to demand and sue for arrears of hire instalments, if any, be entitled to resume possession of the

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goods. By cl. 3 it was agreed that until full payment of the sum of 100*l.* the goods should remain the sole and absolute property of the owner.

Under the agreement the owner had the right to enter upon the premises to inspect the goods, and in the event of a breach of any of the conditions therein contained leave and licence were given by the hirer to the owner to take, remove and resume possession of the goods.

On September 4, 1919, a receiving order was made against George Tabor, trading as G. Tabor & Co., on a creditor's petition dated August 22, 1919, the acts of bankruptcy alleged being (*a*) that he did in England on August 18, 1919, make an assignment to a trustee for the benefit of his creditors generally; (*b*) that on August 20, 1919, he gave notice to his creditors that he had suspended or that he was about to suspend payment of his debts. On September 11, 1919, he was adjudicated bankrupt.

On September 26, 1919, the applicant, Cork, was appointed trustee, his appointment being confirmed by the Board of Trade on September 27, 1919. The unsecured liabilities amounted to 7956*l.* 3*s.* 7*d.* The bankrupt carried on business at 37, King William Street as a wholesale grocer from April 11, 1919, until August 18, 1919, at first in partnership with Mrs. Mabel Stanbank. The partnership was dissolved on June 27, 1919, the business being then insolvent. The bankrupt continued to trade till August 18, 1919, and to advertise until about the end of July, incurring further liabilities. No evidence was given that a custom exists of hiring furniture used in the business of a wholesale grocer.

A. S. Comyns Carr, for the trustee. The hire-purchase agreement did not disentitle the public to assume that the furniture in the bankrupt's business premises belonged to him. He was, therefore, the reputed owner of the furniture within the meaning of s. 38, sub-s. 1 (*c*) of the Bankruptcy Act, 1914, and it formed part of the property of the bankrupt divisible amongst his creditors. As no evidence has been given of the existence of a custom to hire furniture in the business of the wholesale grocery trade, the respondent must, in order to succeed in resisting the declaration asked for by the motion, show from the authorities that the custom of hiring furniture in the wholesale grocery trade is so notorious that the public must assume that furniture does not belong to the ostensible owner.

To take the furniture out of the possession, order and disposition of the bankrupt in such circumstances that he is the reputed owner thereof there must be proof of a custom in the bankrupt's trade to have furniture in his possession on hire. The authorities show that, although the custom exists with regard to furniture in a hotel, it does not apply to furniture generally: *Ex parte Brooks, In re Fowler* (1); *Ex parte Lovering, In re Jones* (*No.* 2) (2); *Ex parte Watkins, In re Couston* (3); *In re Watson & Co., Ex parte Atkin.* (4) The authorities which establish the custom with regard to furniture in a hotel are in favour of the proposition that the custom does not extend further: *Crawcour* v. *Salter* (5); *Ex parte Powell, In re Matthews.*(6) [Williams on Bankruptcy, 11th ed., p. 266, was also referred to.]

Tindale Davis for the respondent. *Ex parte Emerson, In re Hawkins* (7) is conclusive upon the point that a custom to hire furniture exists generally. It is true that that case is criticized at p. 268 of Williams on Bankruptcy, 11th ed., but it has never been overruled. In the present case the furniture was never the debtor's, whereas in all the reported cases with the exception of *Ex parte Emerson, In re Hawkins* (7), the furniture was originally the debtor's. At the present time the hire-purchase system is so notorious that the Court will infer that the custom to hire furniture upon that system exists generally.

[Horridge J. referred to *Ex parte Turquand, In re Parker.* (8)]

The custom of entering into hire-purchase agreements is so notorious that it cannot now be assumed in the case of any business that the goods are the property of the trader in whose possession they are. [*Load* v. *Green* (1) was also referred to.]

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(1) (1883) 23 Ch. D. 261.
(2) (1874) L. R. 9 Ch. 621.
(3) (1873) L. R. 8 Ch. 520.
(4) [1904] 2 K. B. 753.
(5) (1881) 18 Ch. D. 30.
(6) (1875) 1 Ch. D. 501.
(7) 41 L. J. (Bk.) 20.
(8) 14 Q. B. D. 636.

HORRIDGE J. The question whether the furniture was in the order and disposition of the bankrupt under such circumstances that he was the reputed owner thereof is a difficult one. No doubt it was in the order and disposition of the bankrupt at the time the act of bankruptcy was committed by him, but it is said that it was not in his reputed ownership, on the ground that there is such a well-known custom of hiring out furniture that no one is entitled to assume that furniture in a bankrupt's office and warehouse is the bankrupt's property. In order to establish a custom which negatives the clause in the Act as to furniture being within the order and disposition of the bankrupt in such circumstances that he is the reputed owner thereof it is necessary to do so either by evidence in a particular case or else by referring to other cases in which the custom has been held to be established and the Court has taken notice of it. That appears, I think, by the judgment of Mellish L.J. in *Ex parte Powell*, *In re Matthews*. (2) In the present case I have had no evidence before me, and therefore I must find out from the authorities whether the Court has taken judicial notice of the existence of a custom of hiring out furniture generally in such a way that no one is entitled to assume that the furniture which a person has in his shop and warehouse is his own.

The two principles on which this question of custom has been decided are, I think, stated most satisfactorily by the Earl of Selborne L.C. in *Ex parte Turquand*, *In re Parker*. (3) As I understand his judgment, when once the custom is established it does not matter whether the particular furniture is hired or not; the principle is that if the furniture belongs to the class of goods which might be the subject-matter of

(1) (1846) 15 M. & W. 216.

(2) 1 Ch. D. 501.

(3) 14 Q. B. D. 636, 643, 644.

hiring under the custom, the furniture is no longer in the order and disposition of the bankrupt, even though it is not in fact hired under a hiring agreement. He was dealing with the question of furniture in a hotel, and in that case the Court held that it was a well-known custom (and it has been so held in other cases) for hotel proprietors to have furniture hired out to them. The Earl of Selborne L.C. said: "When the existence of a custom notorious in a particular trade or business is proved, the effect of which is that every one who knows the custom knows that articles to which it is applicable, and which are in the place in which the trade or business is carried on, may or may not be the property of the person who is carrying on the trade or business—may or may not be held by him for other persons—then the doctrine of reputed ownership is absolutely excluded as to all the articles which are within the scope of the custom. If the custom were such as has been just now suggested, namely, that in hotels chairs and tables and furniture of that description are ordinarily hired, but crockery is not, then, of course, chairs and tables would be within the custom, and crockery would not. But the custom which was proved in *Crawcour* v. *Salter* (1) related to the furniture in hotels generally, the word 'furniture' being a large word of description, sufficient, if used in a will, to pass furniture of every kind. If in this case the trustee intended to rely on a distinction between some kinds of furniture to which the custom is known to be applicable and others to which it is not, his case should have been presented and supported in a different way. The custom must, I think, as proved, be taken prima facie to apply to all the furnishing of a hotel, of whatever kind. That being so, the effect of the custom is to give notice to all those who know it, or to whom the knowledge of it ought to be imputed, that the furniture of a hotel is not presumptively the property of the person who is occupying the hotel and carrying on the business—it may or may not be so. A man who knows so much as that has no right to say that there is a reputation of ownership by the hotelkeeper of the tables and chairs and other articles of furniture in the hotel if they do not happen in point of fact to be hired, while there is no such reputation as to those articles which are hired." I pause for a moment to point out that the Lord Chancellor there says that it does not matter whether they are hired or not, if they are within the class that comes within the custom. He continued: "The reputation does not apply to the particular articles at all, one way or the other. Where there is such a known custom as to exclude the general application of the law of reputed ownership, any one who gives credit to the trader upon the assumption that some of the articles in his possession may belong to him does so, as Mr. Linklater well expressed it, at his own risk. And, if he were to go and ask the trader questions as to the ownership of the articles, his question should be, not, 'On what terms do you hold this or that article ?' but, 'Is it your own property ?' and any title of any other person, whether it arose under a contract of that particular kind as to which the custom is notorious, or in any other way, would be sufficient to prevent that particular thing from being within the reputed ownership of the trader, when the things in the place generally were not."

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(1) 18 Ch. D. 30.

Therefore, it seems to me that the question with which I have to deal is whether there is such a general custom established by the authorities as to cover all the furniture on the premises of any person whatever, whether it is in fact hired or not. The question comes to this, whether there is so general a custom that no one is entitled to rely on the furniture on the premises of the bankrupt in his trade or business being the property of the bankrupt.

How far have the authorities gone ? *Crawcour* v. *Salter* (1) and one or two other cases have settled that there is a custom to hire out furniture to hotel proprietors, and creditors of a hotel proprietor are not entitled to rely on the furniture in the hotel as belonging to him. Have the authorities gone any further ? I think there is no doubt that in *Ex parte Emerson, In re Hawkins* (2), Bacon C.J. held that there was a custom which protected any hired furniture

(1) 18 Ch. D. 30.

(2) 41 L. J. (Bk.) 20.

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Horridge J.

from being within the order and disposition of the bankrupt, but I doubt whether that case, if I may say so, is good law. I think it is in direct conflict with the language of the Court of Appeal in *Ex parte Brooks, In re Fowler* (1), because in that case Jessel M.R. said: "It is suggested that the habits of English society have become so changed by furniture dealers occasionally letting out furniture on a three years' hiring agreement that the public at large no longer attribute the ownership of furniture to the person who is in possession of it. That proposition strikes me as extravagant. It is not supported by any evidence; it is not in accordance with the old decisions, and it is not in accordance with my view of the law. I certainly should be surprised to hear that it is so common for a man to hire a whole house full of furniture that the public are not entitled to assume that a man is the owner of the furniture in his house."

It is quite true that in *Ex parte Brooks, In re Fowler* (1), the property in the furniture had once been in the bankrupt, and he had, though parting with the ownership, remained in possession of it, but the decision does not rest on any ground of estoppel, and I do not think that that fact matters in view of the language of the Earl of Selborne L.C. to which I have referred, because if it is furniture which comes within the class of goods covered by the custom no one is entitled to rely on it at all as being the property of the bankrupt. My view is that the custom has never been extended in any of the cases, except the one before Bacon V.-C., to include furniture other than furniture dealt with by a particular class of persons, and certainly it has never been extended to a case where the person dealing with it was a wholesale grocer.

As regards, therefore, that portion of the motion the trustee succeeds.

Solicitors for trustee: *Carter & Bell.*

Solicitors for respondent: *Kelseys & Knocker.*

J. E. A.

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(1) 23 Ch. D. 261, 265.

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Jan. 13, 14.

SOLICITOR TO THE BOARD OF TRADE, APPELLANT *v.* ERNEST, RESPONDENT.

Registration of Business Names—Furnishing false Statement—Continuing Offence—Summary Jurisdiction Act, 1848 (11 *&* 12 *Vict. c.* 43), *s.* 11—*Registration of Business Names Act*, 1916 (6 *&* 7 *Geo.* 5, *c.* 58), *ss.* 1, 3, 9.

By s. 9 of the Registration of Business Names Act, 1916, "If any statement required to be furnished under this Act contains any matter which is false in any material particular to the knowledge of any person signing it, that person shall, on summary conviction," be liable to imprisonment or to a fine or to both.

A person, who was required under the Act to be registered, furnished to the registrar on March 16, 1917, a written statement signed by him, in compliance with s. 3 of the statute, but the written statement was false in a material particular to his knowledge. An information was preferred against him under s. 9 of the Act on June 11, 1918, alleging that the offence was committed on May 16, 1918:—

Held, that the offence for which the penalty is imposed by s. 9 of the Registration of Business Names Act, 1916, is the offence of furnishing a statement containing matter false in a material particular to the knowledge of the person signing the statement; that the offence is complete on the day when the statement is furnished; that it is not a continuing offence; and therefore, as the information was not preferred until more than six months after the statement was furnished, it was by virtue of s. 11 of the Summary Jurisdiction Act, 1848, out of time.

CASE stated by a Metropolitan Police Magistrate.

An information was preferred by the appellant on June 11, 1918, under ss. 3 and 9 of the Registration of Business Names Act, 1916 (1), against the respondent for that on May 16,

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(1) Registration of Business Names Act, 1916, s. 3, sub-s. 1: "Every . . . . person required under this Act to be registered shall furnish by sending by post or delivering to the registrar at the register office in that part of the United Kingdom in which the principal place of business of the . . . . person is situated a statement in writing in the prescribed form containing the following particulars:—

. . . . . .

(*e*) Where the registration to be effected is that of an individual, the present Christian name and surname, any former Christian name or surname, the nationality, and if that nationality is not the nationality of origin, the nationality of origin, the usual residence, and the other business occupation (if any) of such individual."

Sect. 4: "The statement required for the purpose of registration must in the case of an individual be signed by him. . . . ."

Sect. 9: "If any statement required to be furnished under this Act contains any matter which is

1918, a statement required by s. 3, sub-s. 1 (*e*), of the Registration of Business Names Act, 1916, to be furnished by the respondent contained matter which was false to the knowledge of the person signing it being the said respondent, to wit, that his nationality of origin was Danish.

On March 16, 1917, the respondent made an application upon form R.B.N. 1 for registration as an individual under the Registration of Business Names Act, 1916. In that application he gave his nationality of origin as Danish. He was born at Marienwerder in West Prussia in the Empire of Germany on June 13, 1852. On March 16, 1891, the respondent was granted a certificate of naturalization as a British subject. In the memorial praying for a certificate of naturalization he described himself as a subject of the Empire of Germany, and stated that the names and nationality of his parents at the date of the memorial were Michaelis Seligsen and Doris Seligsen, and that they were both German subjects residing at Berlin in the Empire of Germany. The memorial was verified by a statutory declaration made by the respondent. The respondent's father was a Dane born in Denmark and afterwards became a German subject. The respondent when registering himself under the National Registration Act, 1915 (5 & 6 Geo. 5, c. 60), stated his place of birth as Germany.

The respondent stated in the witness box that he understood that the nationality of origin meant nationality by race or descent, and it was contended on his behalf that the words "nationality of origin" in the Act of 1916 meant and were intended to mean nationality by race or descent and not nationality by allegiance, and that the words being so understood by the respondent he could not be convicted of the offence charged.

The magistrate was of opinion on the above facts that the nationality of origin of the respondent was German,

false in any material particular to the knowledge of any person signing it, that person shall, on summary conviction, be liable to imprisonment with or without hard labour for a term not exceeding three months, or to a fine not exceeding twenty pounds, or to both such imprisonment and fine."

and that the statement made by the respondent upon form R.B.N. 1 was false in a material particular to the knowledge of the respondent signing the same, and that he had committed an offence under the Registration of Business Names Act, 1916. The magistrate's attention was however called to the fact that the statement made by the respondent on form R.B.N. 1 was dated March 16, 1917, and he adjourned the case for further argument upon the point whether, having regard to s. 11 of the Summary Jurisdiction Act, 1848 (1), he had power to deal with the case upon an information dated June 11, 1918.

Upon the part of the appellant it was contended that the offence charged was under s. 9 of the Act of 1916, and that there was such an offence so long as the particulars in the statement to be furnished under the Act contained any matter which was false in a material particular to the knowledge of the person signing it.

Upon the part of the respondent it was contended that the offence (if any) was complete on March 16, 1917, and that consequently by virtue of s. 11 of the Summary Jurisdiction Act, 1848, the magistrate had no jurisdiction.

The magistrate held that he had no jurisdiction, as the offence was not a continuing offence, and he accordingly dismissed the information.

Branson (*Sir Gordon Hewart A.-G.* and *H. J. Douglas* with him) for the appellant. The magistrate was wrong in dismissing the information on the ground that he had no jurisdiction. Sect. 11 of the Summary Jurisdiction Act, 1848, is no answer to the offence charged as it is a continuing offence. The offence under s. 9 of the Registration of Business Names Act, 1916, is the fact that a statement required to be furnished contains particulars false to the knowledge of the person signing it; it is not the furnishing of a false statement. The respondent was required by s. 3 to furnish a statement containing certain particulars, the statement which he furnished contained a statement which was false to his knowledge; that misrepresentation continued to operate as long as the false statement continued to appear on the register, and the offence of which the respondent was guilty continued every day the false statement appeared on the register. The respondent allowed the false statement to remain on the register; he ought to have taken steps to have the false statement removed from the register if he wished to avoid liability under s. 9. The question whether or not an offence is a continuing offence does not depend upon whether the section creating the offence does or does not provide a daily penalty: *Ex parte Burnby.* (1) Unless this construction of s. 9 is the correct one the Act will in many cases be inoperative because the public do not have an opportunity of seeing the documents filed at the register until six months or nine months after the passing of the Act.

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(1) Summary Jurisdiction Act, 1848, s. 11: "In all cases where no time is already or shall hereafter be specially limited for making any such complaint or laying any such information in the Act or Acts of Parliament relating to each particular case, such complaint shall be made and such information shall be laid within six calendar months from the time when the matter of such complaint or information respectively arose."

Compston K.C. (*J. H. Watts* with him) for the respondent. The decision of the magistrate in dismissing the information was right. Under s. 11 of the Summary Jurisdiction Act, 1848, a complaint must be made or information laid within six months from the date when the matter of the complaint or information arose. The date when the matter of the information arose in the present case was March 16, 1917, when the respondent furnished the statement containing false particulars to the registrar. The offence under s. 9 of the Registration of Business Names Act, 1916, was then complete. That section must be read as if it provided that if a person required to furnish a statement under the Act furnishes a statement containing any matter which is false in a material particular to his knowledge he shall be liable to be convicted. The offence under the section is the furnishing of the false statement; that offence is complete when the false statement is furnished.

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(1) [1901] 2 K. B. 458.

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SOLICITOR TO THE BOARD OF TRADE v. ERNEST.

It is said that the offence is a continuing offence because the respondent allowed a statement which was false to his knowledge to remain on the register; there is however no machinery under the Act by which a person who has furnished a statement which is false to his knowledge can remove that statement from the register. It can hardly be suggested that he should call the attention of the authorities to the fact that he has committed an offence. An offence is a continuing offence because the person in default can do something to remedy the default. The respondent here cannot do anything to remedy his default. In most cases continuing offences are new offences committed at later dates, but in the present case the respondent did nothing after furnishing the statement on March 16, 1917. If the contention of the appellant is correct the respondent might be liable to a series of convictions and sentenced to imprisonment on each occasion and the respondent could do nothing to stop that liability. A penal statute ought to be construed in a way favourable to the accused.

EARL OF READING C.J. I am of opinion that this appeal fails. The question in the case is whether or not the offence charged by the solicitor to the Board of Trade against the respondent is a continuing offence for which a penalty is imposed by the Act of Parliament. If it is not a continuing offence then s. 11 of the Summary Jurisdiction Act, 1848, is a complete answer to the charge inasmuch as under that section the time for making a complaint or laying an information is limited to six months from the date when the matter of such complaint or information respectively arose, and more than six months had elapsed in the present case between the date when the respondent actually furnished the statement to the registrar and the date when the information was laid.

What happened was that the respondent on March 16, 1917, furnished a statement to the registrar under the Registration of Business Names Act, 1916. In that statement, which was filed in pursuance of ss. 1 and 3 of the statute, he had stated that his nationality of origin was Danish whereas in fact his nationality of origin was German, he having been born in Prussia. An explanation was given by him to the magistrate with which we are not concerned inasmuch as the magistrate came to the conclusion that it did not avail him. The magistrate was of opinion that the statement furnished by the respondent was false in a material particular inasmuch as it contained a statement that his nationality of origin was Danish whereas in truth and in fact he had been born in Prussia. He therefore convicted the respondent on June 18 and sentenced him to two months' imprisonment in the second division. Before however the respondent had left the Court the attention of the magistrate was drawn to s. 11 of the Summary Jurisdiction Act, 1848, and that led to a reconsideration of the case; it was then argued on behalf of the respondent that this was not a continuing offence, whereas the Board of Trade contended that it was. The question before us now is whether the magistrate was right in refusing to convict and in dismissing the information because the offence charged in the information had been committed some fourteen months before the date of the information, whereas by s. 11 of the Summary Jurisdiction Act, 1848, the time for commencing proceedings is limited to six months after the date of the commission of the offence.

The question in my opinion turns entirely upon s. 9 of the statute, the material words of which are as follows: "If any statement required to be furnished under this Act contains any matter which is false in any material particular to the knowledge of any person signing it, that person shall, on summary conviction," be liable to imprisonment or to a fine or to both imprisonment and fine. It has been contended on behalf of the Board of Trade that every day that the statement furnished by the respondent appears on the register it contains matter which is false in a material particular to the knowledge of the person who signed it, and that therefore when the information was laid in June, 1918, an offence had been committed within the preceding six months, because the statement contained a false statement on every day during that six months. The answer to that contention on behalf of the respondent is that the offence under the section for which the penalty is imposed is the furnishing of a statement containing false information to the knowledge of the person signing it, and that as the respondent furnished the statement on March 16, 1917, the offence, if an offence was committed at all, was committed on March 16, 1917, and that it was not an offence which continued every day until June, 1918.

I am of opinion that the contention of the respondent is correct, and that the offence for which the penalty is imposed by s. 9 of the Registration of Business Names Act, 1916, is the offence of furnishing a statement containing matter false in a material particular to the knowledge of the person signing it, and that it is not an offence under that section to allow a statement containing false particulars to remain on the register. The question depends entirely upon the construction of the section, and it is unnecessary to refer to authorities. It is I think not unimportant in considering this statute to remember that it does contain a section which makes a certain offence a continuing offence, because s. 7 in imposing a penalty for default in furnishing a statement of particulars says that a person who is in default shall be liable to a fine for every day during which the default continues. That is a clear indication by the Legislature in express language of an intention to make an offence a continuing offence by making the person responsible every day the offence continues. Sect. 9 on the other hand only provides that if the statement which has to be furnished contains false particulars to the knowledge of the person signing it then that person commits an offence. When one sees how the conviction would be recorded one arrives, in my judgment, at the right conclusion in this case. The magistrate expressed the view that the statement furnished by the respondent was false in a material particular, and if there had been a conviction it would have been for furnishing a statement containing false particulars. The moment one arrives at that conclusion the answer is given to the contention of the appellant because the statement was furnished in March, 1917, by the person signing it, who was the respondent. There is no doubt that he did then commit an offence; the information however was not laid until June, 1918, some fifteen months later. In my opinion s. 11 of the Summary Jurisdiction Act, 1848, applies and is a complete answer to the charge. The appeal therefore fails and must be dismissed.

AVORY J. I am of the same opinion. The offence dealt with in this information is a new offence created by statute and the jurisdiction of the magistrate is therefore strictly limited by the words of the section creating the offence, and unless one gathers from the language of that section that the Legislature intended that the offence should be a continuing offence it is obvious that the magistrate has no jurisdiction to consider it as a continuing offence. There is, in my opinion, nothing in s. 9 of the Registration of Business Names Act, 1916, to indicate that the offence there referred to is to be treated as a continuing offence. The ordinary way to treat an offence as a continuing offence is to provide a penalty for each day during which the offence continues, and that is done in s. 7 of this same statute. That section contains a provision that the person who makes default in furnishing particulars is to be liable to a fine not exceeding 5*l.* for every day during which the default continues. I agree that the only way in which a conviction could properly be recorded under s. 9 is that suggested by the Lord Chief Justice—namely, that the person charged did on such and such a day furnish a statement which was false to his knowledge, and that view is confirmed by the words in the section "false . . . to the knowledge of any person signing it." When one turns to s. 4 one finds that the person who is required to furnish the particulars must sign the statement, and it is obvious therefore that s. 9 contemplates a statement furnished by a person who at the time when he signs it knows that it is false, and for that offence he is liable to the one penalty, and that penalty only, which is provided in the section. I agree therefore that the appeal should be dismissed.

SANKEY J. I agree.

Appeal dismissed.

Solicitor for appellant: *Solicitor to the Board of Trade.*
Solicitor for respondent: *Maurice Mosely.*

R. F. S.

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Jan. 28.

MAYO *v.* JOYCE.

Landlord and Tenant—Yearly Tenancy—Notice to Quit—To be given "at any time"—Notice Expiring before End of First Year—Invalidity.

A tenancy agreement in writing by which certain premises were let by the plaintiff to the defendant at a rent of 60*l.* per annum payable on the usual quarter days, provided that "the tenancy shall commence on September 1, 1918, to continue from year to year until determined by three calendar months' notice to quit, which may be given on either side and at any time." On April 29, 1919, the plaintiff gave to the defendant a notice to quit which expired on August 2, 1919:—

Held, that the agreement created a yearly tenancy, and that the notice was a bad notice in that it purported to determine the tenancy before the end of the first year.

APPEAL from Llanwrst County Court.

By an agreement in writing dated August 30, 1918, the plaintiff let to the defendant certain business premises. Clause 2 of the agreement was as follows: "The tenancy shall commence on September 1, 1918, to continue from year to year until determined by three calendar months' notice to quit, which may be given on either side and at any time irrespective of dates fixed hereunder for the payment of rent next hereinafter contained." Clause 3 provided that the rent was 60*l.* per annum payable on the usual quarter days.

The agreement further provided that the tenant should pay all taxes, rates, and outgoings, and should keep the

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premises in good and substantial repair. On April 29, 1919, the plaintiff gave to the defendant a notice to quit which expired on August 2, 1919. The defendant did not give up possession of the premises and the plaintiff brought this action to recover possession.

The county court judge held that the notice to quit was a bad notice, and gave judgment for the defendant.

The plaintiff appealed.

J. B. Matthews K.C. and *Caradoc Rees* for the plaintiff. The decision of the county court judge gives no effect to the express and unqualified provision of the agreement that notice to determine the tenancy may be given "at any time." The effect of those words is that the tenancy may be determined before the completion of the first year. A valid notice might be given on the day after the tenancy began, for the agreement does not create a tenancy for a year certain. If the intention was to create a tenancy from year to year substituting a three months' notice for the usual six months' notice, the words "at any time" are meaningless. [*Bridges* v. *Potts* (1); *Dixon* v. *Bradford and District Railway Servants' Coal Supply Society* (2); *Soames* v. *Nicholson* (3) and *King* v. *Eversfield* (4) were cited.]

W. J. Gandy for the defendant. The language and provisions of this agreement show an intention to create a tenancy from year to year. One of the chief characteristics of a tenancy of that description is that it shall last for at least one year. The length of the notice to determine a tenancy from year to year, and the time at which the notice may be given, are merely incidents of the tenancy, and, as in this case, may be the subject of a special agreement between the parties. The provision in this agreement that the notice may be given at any time must be construed as subject to the essential feature of a yearly tenancy that it shall continue for a year certain. The county court judge rightly held, therefore, that notice could not be given to

(1) (1864) 17 C. B. (N.S.) 314.
(2) [1904] 1 K. B. 444.
(3) [1902] 1 K. B. 157.
(4) [1897] 2 Q. B. 475.

determine the tenancy during the currency of the first year.

Matthews K.C. replied.

BAILHACHE J. This case raises a question of considerable difficulty as to the construction of a tenancy agreement. [The learned judge stated the facts and read clauses 2 and 3 of the agreement.] The question is whether on the true construction of that agreement the plaintiff was entitled to give a notice determining the tenancy on August 2, 1919, that is, before the expiration of the first year of the tenancy. It is contended for the plaintiff that the notice was a good notice because clause 2 of the agreement provides in express terms that the notice may be given "at any time," and it was conceded that if that be the true view a notice might have been given on the day after the tenancy began. On the other hand, it is said for the defendant that it can be sufficiently gathered from the terms of the agreement that the intention of the parties was to create a yearly tenancy, and one, therefore, which could not be determined before the end of the first year. There is no doubt that, apart from the provision as to giving notice at any time, the agreement does create a yearly tenancy, for the provision for the payment of rent quarterly of itself creates a yearly tenancy, and there are other provisions in the agreement from which it may be inferred that the parties did not intend that the tenancy might be determined immediately it began. Now, the ordinary incidents of a yearly tenancy are well ascertained. It may be determined, in the absence of any provision to the contrary, by a six months' notice expiring on the date on which the tenancy began. The result is that it may be determined at the end of the first year, but if notice is not given for the end of the first year, then the tenancy continues at any rate until the end of the second year. It is said for the defendant that the object of clause 2 was to make provision for terminating the tenancy in a manner different from that which would ordinarily apply to a yearly tenancy, that is to say, by a three months' notice instead of the usual six months' notice. It is pointed out that the tenancy is to "continue" from year to year, and the word "continue" is more commonly used in the case of a yearly tenancy which has run for one year and is still continuing. The parties also appear to have desired to alter the ordinary incidents of a yearly tenancy in another respect. In the case of an ordinary yearly tenancy the notice must expire on the date of the commencement of the tenancy. This agreement provides that it may be given "at any time." Did the parties mean by that that the notice might be given on the day after the tenancy began? I do not think so. In my opinion those words were inserted for another purpose. The rent was payable on the usual quarter days, and if the agreement had been silent as to the time when the notice was to be given a question might have arisen whether the notice should be one expiring on a quarter day or on the date when the tenancy began. The parties did not want to have any dispute as to that, and therefore the agreement provides that the notice may be given at any time. In my view the parties intended that there should be a yearly tenancy, that is, a tenancy for one year certain, but which might continue longer. Whether it did continue for more than a year would depend on whether it was determined by notice, and they have provided that the notice shall be, not the ordinary six months' notice, but a three months' notice, and, further, it is to be a three months' notice expiring not necessarily on a quarter day or on the day of the commencement of the tenancy, but at any time.

I think the question is one of considerable difficulty, and there is a great deal to be said for the argument which has been addressed to us on behalf of the plaintiff, but I have come to the conclusion that the decision of the county court judge was correct and that this appeal must be dismissed.

SANKEY J. I agree. The point is, to my mind, one of considerable difficulty, and I have had great doubt as to what our decision ought to be. None of the cases which have been cited covers this case, and counsel have not succeeded in finding any authority precisely in point. In construing this agreement I think one must first bear in mind clause 3. That clause, taken by itself, creates a yearly tenancy, and the subsequent clauses under which the tenant has to pay all rates, taxes, and outgoings, and has to keep the premises in good and substantial repair also point to the conclusion that the parties intended to create a yearly tenancy which would, at any rate, last for a year certain. One would not expect to find clauses such as these in an agreement which entitled either party to determine the tenancy at the end of the first three months. Clause 2, which I think comes out of its proper order, provides for the method of terminating the tenancy, and it varies the ordinary method of terminating a yearly tenancy by a six months' notice expiring on the date of the commencement of the tenancy, by providing for a three months' notice to be given at any time. I do not think that that authorizes the giving of a notice which would terminate the tenancy before the expiration of the first year, and thus prevent it from being a yearly tenancy.

Appeal dismissed; leave to appeal.

Solicitor for plaintiff: *J. M. Voss, for J. P. Whittingham, Nantwich.*

Solicitors for defendant: *Bennett & Ferris, for R. B. Hind, Newcastle-under-Lyme.*

F. O. R.

CHESTER, Appellant *v.* BATESON, Respondent.

1920
Jan. 26, 29.

Emergency Legislation—Defence of the Realm—Munition Worker—Ejectment—Consent of Minister of Munitions—Defence of the Realm Regulations, 2A (2.)*—Ultra vires—Invalidity—Defence of the Realm Consolidation Act,* 1914 (5 *Geo.* 5, *c.* 8), *s.* 1, *sub-s.* 1.

Regulation 2 A (2.) of the Defence of the Realm Regulations, which provides that "no person shall, without the consent of the Minister of Munitions take . . . . any proceedings for the purpose of obtaining an order or decree for the recovery of possession of, or for the ejectment of a tenant of, any dwelling-house" in which a munition worker is living, and which is situate in an area declared by order of the Minister of Munitions to be a "special area," is not authorized by s. 1, sub-s. 1 of the Defence of the Realm Consolidation Act, 1914, and is, therefore, invalid.

Case stated by justices for Lancashire.

At a Court of summary jurisdiction sitting in the petty sessional division of Lonsdale North in Lancashire a complaint was preferred by the appellant under the Small Tenements Recovery Act, 1838, against the respondent for that the appellant did let to the respondent a dwelling-house in the district of North Lonsdale at the rent of 8*l.* 12*s.* per annum, and that the tenancy did expire on May 12, 1919, and that on July 12, 1919, the appellant duly served on the respondent a notice in writing of his intention to apply to recover possession of the tenement, and that notwithstanding the notice the respondent neglected to deliver up possession of the tenement.

Upon the hearing of the complaint, and without going into the merits, it was submitted on behalf of the respondent that as by an order of the Minister of Munitions, dated December 4, 1917, reg. 2 A (2.) of Defence of the Realm Regulations (1), was applied to the petty sessional division of Londsale North in which the premises in question were situate, there was a fatal defect in the proceedings which ousted the jurisdiction of the justices to issue their warrant in pursuance of the Act of 1838, namely, that it was essential that the appellant should before commencing the proceedings have obtained the consent of the Minister of Munitions to the commencement of the proceedings. By the consent of the parties the justices proceeded to try that question without hearing the complaint on its merits. The respondent was called and proved that he was employed in the shell shop at Messrs. Vickers, Ld., at Barrow-in-Furness, that he was engaged in checking the loading and unloading of shells, shell material and shell forgings, that he was responsible to the manager and that the manufacture of shells was then taking place. No consent of the Minister of Munitions to take the proceedings was put in by the appellant.

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(1) Defence of the Realm Regulations. 2A (2.): "If as respects any area in which the work of manufacturing, producing, repairing, storing, or transporting war material is being carried on, the Minister of Munitions is of opinion that the ejectment from their dwellings of workmen employed in that work is calculated to impede, delay, or restrict that work, he may by order declare the area to be a special

On behalf of the appellant it was contended, inter alia, that reg. 2 A (2.) was ultra vires the Defence of the Realm Consolidation Act, 1914. (1)

The justices were of opinion that the respondent was a workman employed in the work of manufacturing and producing war material; that reg. 2 A (2.) was not ultra vires;

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area for the purpose of this regulation.

"Whilst the order remains in force no person shall, without the consent of the Minister of Munitions, take, or cause to be taken, any proceedings for the purpose of obtaining an order or decree for the recovery of possession of, or for the ejectment of a tenant of, any dwelling-house or other premises situate in the special area, being a house or premises in which any workman so employed is living, so long as the tenant continues duly to pay the rent and to observe the other conditions of the tenancy, other than any condition for the delivery up of possession.

"If any person acts in contravention of this regulation he shall be guilty of a summary offence against these regulations."

(1) Defence of the Realm Consolidation Act, 1914 (5 Geo. 5, c. 8), s. 1: "(1) His Majesty in Council has power during the continuance of the present war to issue regulations for securing the public safety and the defence of the realm . . . .; and may by such regulations authorize the trial . . . . and punishment of persons committing offences against the regulations and in particular against any of the provisions of such regulations designed . . . .; (e) to prevent assistance being given to the enemy or the successful prosecution of the war being endangered."

and that it was essential before the proceedings could be taken that the appellant should obtain the consent of the Minister of Munitions.

The question for the opinion of the Court was whether the justices came to a correct determination and decision in point of law.

Langdon K.C. (*Slesser* and *Jolowicz* with him) for the appellant. Reg. 2 A (2.) is ultra vires and invalid in that it prevents a landlord from having access to Courts of law except with the consent of a Minister of the Crown. It may be that the power to make regulations conferred by s. 1, sub-s. 1 of the Defence of the Realm Consolidation Act, 1914, would justify a regulation prohibiting the ejectment of a munition worker from his dwelling-house, but it was not necessary for that purpose to provide that proceedings in ejectment should not be taken without the consent of the Minister, or to make it a criminal offence if proceedings were taken without that consent. "It by no means follows, however, that if on the face of a regulation it enjoined or required something to be done which could not in any reasonable way aid in securing the public safety and the defence of the realm it would not be ultra vires and void": *Rex* v. *Halliday* (1), per Lord Atkinson. This regulation further offends against the provision of Magna Carta, c. 29: "nulli vendemus, nulli negabimus, aut differemus justitiam, vel rectum": see Coke's Institutes, Part II. (1809 ed. p. 55).

[Darling J. referred to the Vexatious Actions Act, 1896, and *In re Boaler*. (2)]

That Act affords a striking contrast to this regulation, for the prohibition against instituting legal proceedings was contained in an Act of Parliament, and the requisite consent was not that of a Minister of the Crown, but of a judge of the High Court.

The respondent did not appear.

Cur. adv. vult.

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(1) [1917] A. C. 260, 272.

(2) [1915] 1 K. B. 21.

January 29. DARLING J. read the following judgment:—This case came before this Court on a case stated by the justices sitting for the petty sessional division of Lonsdale North in Lancashire and after the argument for the appellant, the respondent not being represented, we reserved judgment.

This case raises the question whether reg. 2 A (2.) goes beyond the authority by the statute 5 Geo. 5, c. 8, confided to His Majesty in Council, to be exercised during the continuance of the present war for the defence of the realm. The words of that regulation are these: [The learned judge read the regulation]. The authority to make this regulation is to be found, if anywhere, in 5 Geo. 5, c. 8, s. 1, sub-s. 1, par. (*e*) in the words: "Otherwise to prevent assistance being given to the enemy or the successful prosecution of the war being endangered." It is objected that the regulation is bad because it forbids any person, without the consent of the Minister of Munitions, to take or cause to be taken any proceedings to recover possession of his own house, or to eject a tenant from it, where the tenant is employed in certain work connected with war material.

Mr. Langdon has contended that this regulation violates Magna Carta, where the King declares: "To no one will we sell, to no one will we refuse or delay right or justice." I could not hold the regulation to be bad on that ground, were there sufficient authority given by a statute of the realm to those by whom the regulation was made. Magna Carta has not remained untouched; and, like every other law of England, it is not condemned to that immunity from development or improvement which was attributed to the laws of the Medes and Persians. I found my judgment rather on the passage in *Rex* v. *Halliday* (1) where Lord Finlay says that Parliament may entrust great powers to His Majesty in Council, feeling certain that such powers will be reasonably exercised; and, further, on these words of Lord Atkinson in the same case (2): "It by no means follows, however, that if on the face of a regulation it enjoined or required something to be done which could not in any

(1) [1917] A. C. 268. (2) [1917] A. C. 272.

reasonable way aid in securing the public safety and the defence of the realm it would not be ultra vires and void. It is not necessary to decide this precise point on the present occasion, but I desire to hold myself free to deal with it when it arises." Here I think it does at last arise; and I ask myself whether it is a necessary, or even reasonable, way to aid in securing the public safety and the defence of the realm to give power to a Minister to forbid any person to institute any proceedings to recover possession of a house so long as a war worker is living in it.

The main question to be decided is whether the occupant is a workman so employed, and the regulation might have been so framed as to make this a good answer to the application for possession, still leaving that question to be decided by a Court of law. But the regulation as framed forbids the owner of the property access to all legal tribunals in regard to this matter. This might, of course, legally be done by Act of Parliament; but I think this extreme disability can be inflicted only by direct enactment of the Legislature itself, and that so grave an invasion of the rights of all subjects was not intended by the Legislature to be ✓ accomplished by a departmental order such as this one of the Minister of Munitions.

There are some instances in which Parliament has deliberately deprived certain persons of the ordinary right of citizens to resort to the King's Courts for the righting of alleged wrongs. The most notorious of these is the Vexatious Actions Act, 1896, which provides: "It shall be lawful for the Attorney-General to apply to the High Court for an order under this Act, and if he satisfies the High Court that any person has habitually and persistently instituted vexatious legal proceedings without any reasonable ground for instituting such proceedings, whether in the High Court or in any inferior court, and whether against the same person or against different persons, the Court may, after hearing such person or giving him an opportunity of being heard, after assigning counsel in case such person is unable on account of poverty to retain counsel, order that no legal proceedings shall be instituted by that person in the High Court or any other Court, unless he obtains the leave of the High Court or some judge thereof, and satisfies the Court or judge that such legal proceeding is not an abuse of the process of the Court, and that there is prima facie ground for such proceeding. A copy of such order shall be published in the *London Gazette.*" Let it be observed how carefully, even when so high an official as the King's Attorney-General intervenes, resort to the Courts of justice is preserved, and contrast this with the power of veto uncontrolled which is claimed for the Minister of Munitions.

This exceptional statute has been already enforced, as may be seen by reference to *In re Boaler.* (1) In giving judgment in that case, Scrutton J. used these words: "One of the valuable rights of every subject of the King is to appeal to the King in his Courts if he alleges that a civil wrong has been done to him, or if he alleges that a wrong punishable criminally has been done to him, or has been committed by another subject of the King. This right is sometimes abused and it is, of course, quite competent to Parliament to deprive any subject of the King of it either absolutely or in part. But the language of any such statute should be jealously watched by the Courts, and should not be extended beyond its least onerous meaning unless clear words are used to justify such extension." It is to be observed that this regulation not only deprives the subject of his ordinary right to seek justice in the Courts of law, but provides that merely to resort there without the permission of the Minister of Munitions first had and obtained shall of itself be a summary offence, and so render the seeker after justice liable to imprisonment and fine. I allow that in stress of war we may rightly be obliged, as we should be ready, to forgo much of our liberty, but I hold that this elemental right of the subjects of the British Crown cannot be thus easily taken from them. Should we hold that the permit of a departmental official is a necessary condition precedent for a subject of the realm who would demand justice at the seat of

(1) [1915] 1 K. B. 21, 36.

judgment the people would be in that unhappy condition indicated, but not anticipated, by Montesquieu, in De l'Esprit des Lois, where he writes: "Les Anglais pour favoriser la liberté ont ôté toutes les puissances intermédiaires qui formoient leur monarchie. Ils ont bien raison de conserver cette liberté; s'ils venoient à la perdre, ils seroient un des peuples les plus esclaves de la terre." [Livre 2, c. 4.]

AVORY J. read the following judgment:—This appeal raises a question as to the legal validity of that portion of the second clause of reg. 2 A of the Defence of the Realm Regulations which provides that whilst an order creating a special area under that regulation remains in force no proceeding shall be taken for the ejectment of a tenant without the previous consent of the Minister of Munitions, subject to certain conditions which are there provided for.

The effect of this regulation is that, if any person without the previous consent of the Minister of Munitions commences proceedings in any of the King's Courts of justice of the kind prohibited, he is guilty of a criminal offence and liable to six months imprisonment or a fine of 100*l.* or both; and the only question for decision is whether this portion of the regulation is ultra vires the statute under which it purports to be made, that is to say, the Defence of the Realm Consolidation Act, 1914. This depends upon whether it can be said, on any reasonable construction of the statute, to be a regulation for securing the public safety and the defence of the realm, and, particularly under s. 1, sub-s. 1 (*e*), whether it can be said to be a regulation to prevent the successful prosecution of the war being endangered; the latter being probably the most plausible ground on which it might be supported. We have not had the advantage of hearing any argument in support of it, nor are we favoured with the grounds of the decision of the justices. The purpose in view when the regulation was made, namely, to prevent the disturbance of munition workers in their dwellings, may, without doubt, be said to be reasonable; and a regulation, designed to prevent such disturbance, providing that no order for ejectment should be made except under conditions prescribed, would probably be held to be intra vires the statute; but the objection which is made to the regulation as it stands is that it deprives the King's subjects of their right of access to the Courts of justice and renders them liable to punishment if they have the temerity to ask for justice in any of the King's Courts. It is not difficult to conceive a case in which a landlord might honestly believe that the rent had not been paid, or some other condition of the tenancy had been violated by the tenant, which would justify him in applying to a Court of justice for an order of ejectment without the consent of the Minister of Munitions; but if it should be determined that he was mistaken, either in law or fact, he would be liable to punishment for having instituted the proceedings. In my opinion there is not to be found in the statute anything to authorize or justify a regulation having that result; and nothing less than express words in the statute taking away the right of the King's subjects of access to the Courts of justice would authorize or justify it.

I have based my judgment solely upon the construction of the statute which confers the power to make regulations. If the question had to be determined as a question of constitutional law I should agree that this regulation is in conflict with, and in violation of, the provisions of Magna Carta, cc. 39 and 40; of the Bill of Rights (1 Will. & Mary, Sess. 2, c. 2, s. 1) which provides that the pretended power of suspending the laws or the execution of laws by regal authority without consent of Parliament is illegal; and, particularly, it would be in violation of the statute of Northampton, 2 Edw. 3, c. 8, which provides: "It is accorded and established that it shall not be commanded by the great seal nor the little seal to disturb or delay common right; and though such commandings do come, the justices shall not therefore leave to do right in any point"—"shall not leave to do right" means shall not omit to do right—"notwithstanding that there is a commanding under the great or little seal." In this connection I think it not inappropriate to quote a passage from the opinion, although it was a dissentient opinion, of Lord Shaw of Dunfermline, in the case of *Rex* v. *Halliday* (1) where he says: "Whether the Government has exceeded its statutory mandate is a question of ultra or intra vires such as that which is now being tried. In so far as the mandate has been exceeded, there lurk the elements of a transition to arbitrary government, and therein of grave constitutional and public danger. The increasing crush of legislative efforts and the convenience to the Executive of a refuge to the device of Orders in Council would increase that danger tenfold were the judiciary to approach any such action of the Government in a spirit of compliance rather than of independent scrutiny." For these reasons I hold this part of the regulation to be ultra vires and invalid; and the appeal therefore should be allowed and the case remitted to the justices to hear and determine.

SANKEY J. read the following judgment:—I agree. The short point involved in this case is whether regulation 2 A (2.) of the Defence of the Realm Regulations is invalid. That regulation purports to be made under the authority of the Defence of the Realm Consolidation Act, 1914, passed on November 27 of that year, by s. 1 whereof His Majesty in Council has power "during the continuance of the present war to issue regulations for securing the public safety and the defence of the realm" and particularly a regulation designed to prevent "the successful prosecution of the war being endangered." In pursuance of those powers regulation 2 A (2.) was issued and I need not again read it.

The effect of this regulation is that in particular instances no person is entitled to take proceedings of the character described, without the consent of the Minister of Munitions. In my view the words in the statute relied upon as giving power to His Majesty to make this regulation do not enable him to do so, nor is there anything in the Act of 1914 which authorized the making of regulations forbidding access to the King's Courts. It is true that the power to make a regulation to prevent the successful prosecution of the war being endangered is of a wide and sweeping character, but I decline to hold that Parliament intended by these general words to give to the Executive the right to close any of the King's Courts against his subjects unless they obtained the sanction of a minister to resort thereto.

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(1) [1917] A. C. 287.

It might have been competent under the words of the statute, although I express no opinion on the point, to make regulations constituting the consent of the Minister of Munitions in a proper case, a condition precedent to the making of an order for the recovery of possession of, or for the ejectment of a tenant of, any dwelling-house or other premises of the character referred to. It was not, however, competent for His Majesty in Council to make a regulation enacting that a man who seeks the assistance of, or the protection of, the King's Courts should be exposed to fine and imprisonment for having done so. It would have been astonishing if Parliament had conferred such a power as that. See what would have happened in a doubtful case. A man believing in all good faith that he was entitled to bring proceedings finds he is wrong on the evidence, but the mere fact of his having brought them is to make him guilty of an offence and liable to fine or imprisonment. I am of opinion that the regulation so made is beyond the powers conferred by the Act of Parliament. I should be slow to hold that Parliament ever conferred such a power unless it expressed it in the clearest possible language, and should never hold that it was given indirectly by ambiguous regulations made in pursuance of any Act.

In a somewhat similar case Scrutton J. laid down the principle which I think should be applied in this case, in the following words: "On the whole I think the language is more suited to the narrower than the wider meaning. The narrower meaning will affect the liberties of the subject to some extent; the wider meaning will most seriously affect the liberties of the subject in a matter, his personal liberty and safety, which I see no reason in the Act to believe was in the contemplation of the Legislature. I decline to make this more serious interference with the liberty of the subject, unless the Legislature uses language clear enough to convince me that that was its intention." See *In re Boaler*. (1) For these reasons I am of opinion that the regulation is invalid; this appeal succeeds and the matter should be remitted to the justices.

Slesser. I ask for an order for costs against the respondent although he has not appeared in this Court. The case is in effect a civil, and not a criminal matter, being a complaint under the Small Tenements Recovery Act, 1838; and the proceedings might have been brought in a county court. The Court has power in its discretion to award costs to the appellant: *Wednesbury Local Board of Health* v. *Stephenson*. (2)

DARLING J. We do not think that there is any ground for departing in this case from the ordinary practice not to give costs against a respondent who does not appear in this Court, unless he is the party who has set the law in motion.

Appeal allowed; case remitted to justices.

Solicitors for appellant: *Mills, Lockyer, Mills & Evill.*

(1) [1915] 1 K. B. 41.

(2) (1864) 33 L. J. (M. C.) 111.

F. O. R.

1920
Jan. 30.

CHAMBERS *v.* TABRUM.

Solicitor—Action by Client for Account—Jurisdiction of County Court.

The plaintiff retained the defendant to act for him as his solicitor in four matters. In one only were proceedings taken in the county court; in none of the others was process issued. As the defendant delayed to deliver a cash account and bill of costs, the plaintiff issued a plaint in the county court claiming an account:—

Held, that the plaintiff was entitled to claim this relief in the county court and was not limited to the summary remedy by summons in the High Court under the Solicitors Act, 1843; but, *semble,* the plaintiff would have to accept as accurate the amounts of the defendant's bills of costs as to matters in respect of which there had been no proceedings in the county court.

Appeal from Bloomsbury County Court.

The plaintiff claimed (1.) an account of moneys had and received by, moneys retained by, and moneys paid to, the defendant in respect of matters in which the defendant was retained by the plaintiff as his solicitor; and (2.) a declaration that the plaintiff was entitled to the delivery of a bill of costs in respect of the matters in which the defendant was retained as aforesaid, and the taxation of the bill of costs when delivered.

The defendant was retained by the plaintiff in four matters. In one, proceedings were taken in the county court; in none of the others was process issued. The plaintiff subsequently applied to the defendant for an account and for a bill of costs. Owing to his depleted staff there was some delay by the defendant in delivering these, whereupon the plaintiff issued a plaint in the county court claiming the relief set out above. Immediately before the hearing the defendant delivered a bill of costs and a cash account which debited the plaintiff with the costs in the four matters, and credited him with certain moneys received, a balance of 5*l.* 14*s.* 5*d.* being shown as due to the defendant. It was objected for the defendant that the action would not lie, and that the proper procedure was by summons in the High Court under the Solicitors Act, 1843. The county court judge rejected this contention and made an order for an account in terms of the first part of the claim.

The defendant appealed.

Arthur Lawton for the defendant. The county court had no jurisdiction to entertain this action. The county court can only deal with costs incurred in that Court: see s. 118 of the County Courts Act, 1888; and in this case three of the four bills of costs included in the cash account were concerned with matters in which process had not been issued. The Legislature has provided a summary remedy under the Solicitors Act, 1843, s. 37, and the Rules of the Supreme Court make specific provision for the procedure—namely, by originating summons: Order LII., r. 25; Order LIV., r. 4 F (2.); and this procedure applies to non-contentious as well as to contentious business: Order LXV., r. 26 A. It has been decided that an action against a solicitor for an account cannot be brought in the High Court: *Phillips* v. *Galmoye.* (1) See also *Harvey* v. *Mayhew.* (2) The case of *In re Godfree and Godfree* (3), which was cited to the county court judge, and upon which he placed some reliance, has no bearing. There Bankes J. sitting in chambers decided that where costs are wholly incurred in a county court an order to tax them cannot be obtained in the High Court. In this case the costs were not wholly incurred in the county court.

Samuel J. Duncan for the plaintiff. The relationship of principal and agent exists between client and solicitor, and the client is entitled to have an account of the transactions between them. In *O'Brien* v. *Lewis* (4) Stuart V.-C. said that "it never has been held that the summary jurisdiction by petition at the Rolls excludes the right of the client to file a bill against his solicitor; and where there have been pecuniary transactions between them, to have the account regularly taken by the Court under its general jurisdiction as a Court of equity, entertaining suits for accounts between plaintiffs and defendants." [He was stopped.]

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(1) (1885) 29 Sol. J. 422.

(2) (1853) 2 W. R. 128.

(3) (1912) Unreported; noted in Annual Practice for 1920, p. 1256.

(4) (1862) 7 L. T. 734, 735.

Lawton in reply. The view expressed in *O'Brien* v. *Lewis* (1), if intended to apply generally, is directly contrary to that expressed in the later case of *Phillips* v. *Galmoye*. (2) If the action can be brought in the county court the Registrar has no power to take the account where, as here, it includes matters of which the county court is not seised.

Bailhache J. In my opinion the decision of the county court judge was right. The form of action may be somewhat unusual, but I think any inconveniences which it may cause are inconveniences affecting the plaintiff rather than the defendant. It is obvious that the only costs which can be taxed in the county court are those incurred in that court; and if the plaintiff sues in the county court for an account, he must accept the bills of costs rendered by the defendant relating to matters not in the county court as correct, for they cannot be taxed in that Court, and it may be that they are not taxable anywhere. That is the penalty which the plaintiff pays by adopting this form of action; but if he chooses to incur this risk he may do so, and he is not limited to the procedure under the Solicitors Act. That seems to have been the view taken by the county court judge. As I cannot say that the action does not lie, the appeal must be dismissed.

Sankey J. I agree, although I think it is quite possible that this form of procedure may operate to the plaintiff's disadvantage.

Appeal dismissed.

Solicitors for plaintiff: *Haslewood, Hare & Co.*
Solicitor for defendant: *W. J. Tabrum.*

J. S. H.

(1) 7 L.T. 734, 735.

(2) 29 Sol. J. 422.

SIMMONDS *v.* COCKELL.

1920
Feb. 9.

Insurance—Theft—Housebreaking—Warranty—Premises to be "always occupied"—Temporary Absence—Premises left unattended.

By a policy of insurance the contents of premises used for business and residential purposes by the assured and his wife were insured against loss by housebreaking or theft. The policy contained a clause: "Warranted that the said premises are always occupied." During a temporary absence of some hours of the assured and his wife on a Sunday the premises were left unattended and were broken into and some of the contents were stolen. In an action on the policy,

Held, that the warranty did not mean that the premises should at no time be left unattended, but that they should be continuously occupied as a residence; that there had in the circumstances been no breach of the warranty, and that the assured was therefore entitled to recover the loss on the policy.

Action in the commercial list tried by Roche J. without a jury.

The plaintiff, who carried on business as a ladies' outfitter at 151, Whitecross Street, E.C., claimed to recover a loss under a policy of insurance, subscribed by the defendant and other underwriters at Lloyds, by which the contents of the plaintiff's premises were insured against loss or damage by (inter alia) burglary, housebreaking or theft. The policy contained the following clause: "Warranted that the said premises are always occupied." The plaintiff and his wife, and no other person, resided on the premises. On Sunday, June 21, 1919, during the currency of the policy, the plaintiff and his wife were attending a social function, and the premises were left unattended between 2.30 p.m. and 11.30 p.m., except for a short interval between 6 p.m. and 7 p.m., when the plaintiff was on the premises. On the return of the plaintiff and his wife at 11.30 p.m. it was found that during their absence the premises had been broken into and some of the contents of the value of 400*l.* had been stolen.

van der Berg for the defendant. In a burglary policy the word "occupied" is not to be construed in the technical sense which would be given to it in a case of rating or franchise law.

The word "occupied" in this policy means that there shall be some one physically present on the premises, and the effect of the addition of the word "always" is that the premises must never be left unattended. A temporary absence of the plaintiff and his wife for even so short a time as a quarter of an hour would constitute a breach of the warranty. The protection given by the warranty would be just as effectively lost in that case as if the absence lasted for a whole day.

Austin Farleigh for the plaintiff. If the word "occupied" is ambiguous it must be given that meaning which is most favourable to the assured. The word does not necessarily connote physical presence. The warranty means that the premises are to be used as a dwelling-house as well as a shop. In the circumstances of this case there has been no breach of the warranty: *Winicofski* v. *Army and Navy General Assurance Co.* (1); *Phœnix Insurance Co.* v. *Tucker* (2); *Eddy* v. *Hawkeye Insurance Co.* (3)

ROCHE J. stated the facts and continued: The question is what is the meaning of the clause in this policy: "Warranted that the said premises are always occupied." If that means, as the defendant contends, that the premises are never to be left unattended, then there has undoubtedly been a breach of the warranty for both the plaintiff and his wife were absent from the premises for some hours on the day in question. But in my judgment that is not the meaning of the warranty. I think it means that the premises are to be used, continuously and without interruption, for occupation, that is to say, as a residence, and not merely used as a lock-up shop which is left unoccupied after business hours. I am fortified in arriving at this conclusion by the judgment of Bray J. in *Winicofski* v. *Army and Navy General Assurance Co.* (1), and by the American decisions, most of which are collected in Mr. Macgillivray's most useful book on Insurance Law at p. 887.

But the matter does not rest there, for if the warranty does not bear the meaning which I have given to it, I should hold that the language used is very ambiguous; and it is a well-known principle of insurance law that if the language of a warranty in a policy is ambiguous it must be construed against the underwriter who has drawn the policy and has inserted the warranty for his own protection.

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(1) (1919) 35 Times L. R. 283.

(2) (1879) 92 Ill. 64.

(3) (1886) 70 Iowa, 472.

It was contended for the defendant that if the warranty is to be construed in the way I suggest it affords very little protection to the underwriters. I do not agree. If the premises are used for residential as well as for business purposes, it is obvious that a thief would never know at what moment the occupier might return from a temporary absence. It is that kind of occupation which this warranty requires and which has been secured. The defendant has not stipulated for the continuous presence of some one in the premises, which he could have done by providing that the premises were never to be left unattended. There must therefore be judgment for the plaintiff.

Judgment for plaintiff.

Solicitors for plaintiff: *Osborn & Osborn.*
Solicitors for defendant: *Windybank, Samuell & Lawrence.*

F. O. R.

1920
Feb. 16.

S.S. LORD (OWNERS) *v.* NEWSUM, SONS AND COMPANY, LIMITED.

Shipping—Charterparty—Exemption—"Error of judgment . . . . in the management or navigation of the steamer"—Error of Judgment in Choice of Route.

A clause in a charterparty exempted the owners from liability for loss or damage caused by the negligence, default, or error of judgment of the pilot, master or crew "in the management or navigation of the steamer":—

Held, that an error of judgment by the master while in harbour as to the route he should pursue to his port of destination was not an error of judgment "in the management or navigation of the ship."

The word "navigation" as used in the clause refers to a ship which is in motion or is being cast off.

AWARD in the form of a special case.

By a charterparty dated April 8, 1916, the steamship *Lord*, a Norwegian vessel, was chartered by her owners to H. Newsum, Sons and Co., Ld., of Manchester, for six calendar months. The vessel was delivered to the charterers, who sublet her to Messrs. Coker for a voyage from Liverpool to Archangel—a voyage which, as was required by the terms of the charterparty, was duly approved by the Norwegian War Insurance Association. The *Lord* sailed from Liverpool on September 26, 1916. At that time, as was known by all the parties, there was considerable danger from the presence of German submarines off the British Isles and also off the coast of Norway, and more particularly between Vardoe and Archangel. The *Lord* proceeded by way of the Norwegian coast and the Norwegian territorial waters, and on October 6, 1916, arrived at Honningsvaag, which is situated in the north of Norway, and was the point at which it was necessary for the master to determine as to the best route for the remainder of the voyage. At the material time the route prescribed by the British Admiralty and the Norwegian War Insurance Association was for vessels to proceed by making a considerable detour of 150 to 200 miles from the

Norwegian coast. At Honningsvaag the master, being informed that German submarines were outside and east of Vardoe, decided to wait, and after some time, notwithstanding the advice of the Norwegian War Insurance Association to continue the voyage by making a wide detour out at sea, he determined to follow the coast route to Vardoe, considering this to be less dangerous. He accordingly followed the coast route to Vardoe where the *Lord* arrived on October 11. She remained there for some time. Communications passed between the master and the owners and the Norwegian War Insurance Association. On October 23 the crew refused to proceed to Archangel under the prevailing conditions. The charterers protested, but on October 31, owing to the lateness of the season and the continued danger, the voyage to Archangel was treated as abandoned by all parties, and eventually the cargo was discharged at Drontheim.

Disputes between the parties as to claims for hire and a claim by the charterers for damages for breach of the charterparty were referred to arbitration.

The umpire found that in disregarding the advice of the Norwegian War Insurance Association on arrival at Honningsvaag to proceed from there to Archangel at a considerable distance from the Norwegian coast, the master of the *Lord* was guilty of a grave error of judgment, that his failure to sail was a breach of cl. 9 of the charterparty, which required him to "prosecute his voyages with the utmost despatch," and that if the *Lord* had sailed in accordance with the advice given by the Norwegian War Insurance Association there was a strong probability that she would have reached Archangel safely. The umpire accordingly awarded damages to the charterers in respect of this breach, but found that on balance a sum was due to the owners for hire.

The owners contended that even if there had been an error of judgment on the part of the master, the owners were, by cl. 14 of the charterparty, exempted from liability. Clause 14 provided that "throughout this charter losses or

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damages, whether in respect of goods carried or to be carried or in other respects arising or occasioned by the following causes shall be absolutely excepted—viz. : . . . . negligence, default or error of judgment of the pilot, master, or crew, or other servants of the owners, in the management or navigation of the steamer."

Neilson K.C. and *Jowitt* for the owners. Even assuming that the umpire is right in holding that the master was guilty of a grave error of judgment in disregarding the advice of the Norwegian War Insurance Association at Honningsvaag the owners are relieved from liability by cl. 14 of the charterparty.

[BAILHACHE J. Do you include in the term "navigation" a decision of the master, when in harbour, with regard to the route he will pursue ?]

Yes, especially where, as in this case, the vessel was in the Norwegian fiords. The master had to consider and did consider the dangers of the respective routes and he decided in favour of the one he considered the less dangerous.

MacKinnon K.C. and *Le Quesne* for the charterers. The decision of the master was a decision as to choice of route or voyage, and had nothing to do with the management or navigation of the ship. In *The Renée Hyaffil* (1), a delay in port for reasons of safety was held not to be covered by a clause similar to cl. 14. As Swinfen Eady L.J. said, "That delay had nothing to do with the navigation or management of the ship as such."

Neilson K.C. in reply. There was an error of judgment in navigation when the master, having made up his mind to proceed by the coast route from Honningsvaag, translated that decision into action by directing the ship to Vardoe.

BAILHACHE J. stated the facts and continued : Mr. Neilson, for the owners, has contended that the choice by the master of the route from Honningsvaag to Archangel by way of Vardoe, and his rejection of the route he was advised to take, namely, by making a wide detour, was an error of judgment or negligence by him in the management or navigation of the ship within cl. 14. No one would say that what the master did was done by him in the "management" of the ship, but the question remains, was it something done in the "navigation" of the ship? Some light is thrown upon the meaning of the term "navigation" as there used by having regard to the other persons named in addition to the master, namely the pilot, and crew. In my opinion the word "navigation" as used in cl. 14 refers to a ship which is in motion, a ship which is being navigated. The pilot can hardly make an error in navigation and indeed would not as a rule be employed, save when the ship is in motion or is being cast off. The word "management" may well be applied to a ship while she is in harbour and also while she is in motion, and the two words taken together denote something done in the user or control of the ship while in harbour or on her voyage. Things done of that nature come within the terms "navigation or management," but the deliberate choice, while in harbour, of one of two routes to be pursued cannot, I think, be an error in the "management" or in the "navigation" of the ship. There is no doubt sometimes great difficulty in drawing the line between what is and what is not "navigation," but I think the line ought to be drawn in the way I have indicated and as excluding the deliberation by the master in port regarding the route by which he will proceed to his port of destination. I think the umpire was entitled to hold that there was a breach of contract and that the error of judgment by the master is not excepted by cl. 14.

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(1) (1916) 32 Times L. R. 660.

Award upheld.

Solicitors for owners: *Botterell & Roche.*

Solicitors for charterers: *Thomas Cooper & Co., for Hill, Dickinson & Co., Liverpool.*

J. S. H.

1920
Feb. 16, 17.

VAN DEN HURK *v.* R. MARTENS & Co., LIMITED (IN LIQUIDATION).

Contract—Breach—Measure of Damages.

The respondents sold to the claimant sodium sulphide in drums. The drums were delivered to the claimant in Manchester, but the respondents knew that they were intended for export. Owing to the difficulty of opening and reclosing the drums it is impracticable to open them until the contents are actually required for use. The drums were resold by the claimant, and owing to congestion on the French railways and other causes they did not reach the ultimate consignees at Lyons and Genoa respectively till some months later. On the drums being opened by those consignees the contents were found to be not sodium sulphide but caustic soda of inferior quality. The drums were thereupon rejected. On a claim for damages by the claimant against the respondents:—

Held, that the damages were to be assessed according to the prices ruling, not at the date of the delivery in Manchester, but at the date when the drums were opened by the ultimate consignees at Lyons and Genoa.

Company—Arbitration—Liquidator—Liability for Costs.

Where in arbitration proceedings the liquidator of a company is in the position of defendant and an award is made against the company, the costs of the reference and award ought not to be ordered to be paid by the liquidator personally with a right to reimbursement out of the company's assets, but should be ordered to be paid by the company. If, however, the liquidator applies for and obtains the statement of a special case at the hearing of which he fails, he, as being then in the position of plaintiff, may be ordered to pay the costs of the hearing of the special case with a right to be recouped out of the company's assets.

AWARD in the form of a special case.

By contracts entered into between A. Van den Hurk (hereinafter called "the claimant") and R. Martens & Co., Limited (in liquidation) (hereinafter called "the respondents") dated May 10, 1918, and May 29, 1918, the claimant purchased from the respondents a quantity of sodium sulphide. By the first contract delivery was to be by June 25, 1918, ex store Manchester, and by the second delivery was to be July/August f.o.b. Manchester. Under the first contract the respondents gave delivery in May, June and July, and the claimant having resold the goods, the sub-purchaser shipped them to Rouen, but owing to congestion on the French railways they did not reach their destination at Lyons till the end of November. The consignee there having examined the goods rejected them as not being sodium sulphide. The goods under the second contract were similarly dealt with, and owing to the same cause did not reach their destination at Genoa till the end of December. The consignee there rejected them for the same reason.

Disputes arose between the parties owing to claims arising out of the rejection of the goods, and these were referred to arbitration in which the umpire found as follows : The respondents committed a breach of contract in each case by delivering caustic soda bottoms (an inferior quality of caustic soda) instead of sodium sulphide. Caustic soda is totally useless for the purposes for which sodium sulphide is required. The respondents were, and admitted that they had been, informed by the claimant that the sodium sulphide was required for export and was not for home trade. Sodium sulphide is usually packed in iron drums so sealed as to prevent deterioration ; caustic soda is packed in a similar manner ; and in consequence of the great difficulty of opening the drums and the great expense of making the packages good again, it is impracticable, as was known to the claimant and respondents, for the goods to be sampled or examined until they reach the actual user of them. It is not customary in the trade to sample them, and the goods in question were not in fact sampled either by the respondents when they received them from their sellers, or by the claimant when the goods were delivered by the respondents. There was no negligence or delay in the examination of the goods by the claimant. The earliest reasonable opportunity for their examination was on their arrival at the works of the ultimate consignees and users on the Continent, and they were so examined on arrival.

The questions for the Court were (1) whether the damages for the breach of each contract were to be assessed with reference to prices ruling at the date when the defects were first discovered by the ultimate consignees on the Continent—in which case the umpire assessed the damages at 2101*l.*, or with reference to the prices ruling at the date when the goods were delivered by the respondents in England, in which case the umpire assessed the damages at 837*l.* 10*s.*; and (2) whether, as the respondents were in liquidation, the umpire could order the costs of the reference and award to be paid by the liquidator with the right to reimbursement out of the company's assets, or whether he could only order the costs to be paid by the respondents.

Rayner Goddard for the respondents. The damages are to be calculated at the time of delivery of the goods in England to the claimant: Sedgwick on Damages (9th ed.), s. 737. It is true that the respondents knew that the goods were intended for export, but they did not know to what particular destination they were to be sent. That distinguishes this case from *Molling & Co.* v. *Dean & Son.* (1) To hold that the respondents are to be liable in damages to be assessed at the time when the goods are ultimately delivered after a series of sub-purchases to a person in a distant part of the world would, to adopt the language of A. L. Smith L.J. in *Perkins* v. *Bell* (2), be "to expose the vendor to unknown risks, impossible of calculation, when the contract was entered into." The opening of the drums to which the umpire refers was not an opening to ascertain whether the contents were in conformity with the contract, but was an opening for use. [*Heilbutt* v. *Hickson* (3) and *Grimoldby* v. *Wells* (4) were also referred to.]

On the second question, the umpire cannot make an order for costs against the liquidator personally: *In re Bolton & Co.* (5); *In re London Metallurgical Co* (6)

Harold Morris and *Tristram Beresford* for the claimant. The award of the higher sum is to be supported on the ground that delivery was not completed until the goods reached and were examined by the ultimate consignees. The first opportunity of examining the goods was when they reached Lyons and Genoa. The claimant was not bound to inspect them in England: *Molling & Co.* v. *Dean & Son.* (1)

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(1) (1901) 18 Times L. R. 217.
(2) [1893] 1 Q. B. 193, 197.
(3) (1872) L. R. 7 C. P. 438.
(4) (1875) L. R. 10 C. P. 391.
(5) [1895] 1 Ch. 333.
(6) Ibid. 758, 768.

On the second question, the liquidator ought to be ordered to pay the costs personally but with a right to be reimbursed out of the assets.

Rayner Goddard replied.

BAILHACHE J. This case illustrates the great difficulty that sometimes arises in deciding the proper measure of damages although the breach of contract may be perfectly clear, as it is in this case. The contract in question was for the sale of sodium sulphide ex store and f.o.b. Manchester, all of it, to the knowledge of the respondents, to be sent abroad. The sodium sulphide was sent to Lyons and Genoa ; it took some time to get there owing to congestion on the French railways and other causes. When it reached these places it was discovered that instead of being sodium sulphide the article was an inferior kind of caustic soda. There had been no examination of it and no opportunity for examination until it reached Lyons and Genoa. In these circumstances the question for determination is whether the damages ought to be calculated as at the date when the soda was delivered at Manchester or when it was delivered at the ultimate destinations. On the facts which he has found, the umpire has awarded damages on two alternative bases, first, that the proper date for assessing them was the date of the arrival and examination of the goods at Lyons and Genoa, and secondly, when they were delivered in England. In my judgment the proper basis is the date at which the goods arrived at their ultimate destination, and consequently that the proper measure of damages is the higher one, namely, 2101*l.*

The umpire asks further whether the costs of the award ought to be ordered to be paid by the liquidator personally with a right to be reimbursed by the company. In my opinion that would not be a proper order in these circumstances. The liquidator was in the position of defendant to the award and, so far as the costs of the award are concerned, they ought to be paid out of the assets of the company. The liquidator, however, applied for a special case to be stated and had to go to a Master to obtain an order on the umpire to state a

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VAN DEN HURK v. R. MARTENS & CO., LD.

Bailhache J.

case, and in respect of that and of the hearing of this special case the liquidator is in the position of plaintiff, and so far as those costs are concerned the order will be that they be paid by the liquidator with a right to him to be recouped out of the assets.

Solicitors for respondents: *Ince, Colt, Ince & Roscoe.*
Solicitors for claimant: *Cosmo Cran & Co.*

J. S. H.

1919
Dec. 18, 19, 20.
1920
Feb. 12.

NEWCASTLE BREWERIES, LIMITED *v.* THE KING.

Emergency Legislation—Articles requisitioned by Admiralty—Right of Owner to Payment and to Judicial Determination of Amount—Validity of Regulation—Defence of the Realm Regulations, reg. 2 *B.—Defence of the Realm Consolidation Act*, 1914 (5 *Geo.* 5, *c.* 8), *s.* 1.

Regulation 2 B of the Defence of the Realm Regulations made under s. 1 of the Defence of the Realm Consolidation Act, 1914, provides that "it shall be lawful for the Admiralty, Army Council, or Air Council or the Minister of Munitions to take possession of any war material, food, forage and stores of any description and of any articles required for or in connection with the production thereof. Where any goods, possession of which has been so taken, are acquired by the Admiralty, Army Council, or Air Council or the Minister of Munitions, the price to be paid in respect thereof shall in default of agreement be determined by the tribunal by which claims for compensation under these regulations are, in the absence of any express provision to the contrary, determined.

"In determining such price regard need not be had to the market price, but shall be had: (*a*) if the goods are acquired from the grower or producer thereof, to the cost of production and to the rate of profit usually earned by him in respect of similar goods before the war and to whether such rate of profit was unreasonable or excessive, and to any other circumstances of the case; (*b*) if the goods are acquired from any person other than the grower or producer thereof, to the price paid by such person for the goods and to whether such price was unreasonable or excessive, and to the rate of profit usually earned in respect of the sale of similar goods before the war, and to whether such rate of profit was unreasonable or excessive, and to any other circumstances of the case; so, however, that if the person from whom the goods are acquired himself acquired the goods otherwise than in the usual course of his business, no allowance, or an allowance at a reduced rate, on account of profit shall be made:

"Provided that where, by virtue of these regulations or any order made thereunder the sale of the goods at a price above any price fixed thereunder is prohibited the price assessed under this regulation shall not exceed the price so fixed . . . . ":—

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Held, that the regulation, so far as it purports to deprive persons whose goods are requisitioned by the naval or military authorities of their right to the fair market value and to a judicial decision of the amount, is ultra vires.

It is an established rule that a statute will not be read as authorizing the taking of a subject's goods without payment unless an intention to do so be clearly expressed. This rule applies no less to partial than to total confiscation, and it applies a fortiori to the construction of a statute delegating legislative powers.

PETITION of right tried by Salter J.

On October 6, 1917, the Admiralty, acting under Regulation 2 B of the Defence of the Realm Regulations (1) gave notice of their intention to take possession of a quantity of rum then belonging to the suppliants ; and on November 20, 1917, they took possession of 239 puncheons. The suppliants claimed the market value of the rum, and that the value should be determined, unless agreed, by a Court of law. The Admiralty rejected both these claims, and offered, without prejudice, 10,774*l.* 9*s.* 3*d.*, which was not much more than one-third of the market value as alleged by the suppliants. The Admiralty said that nothing more was payable unless a further payment should be determined by the Losses Commission appointed on March 31, 1915. Thereupon the suppliants filed this petition of right.

Douglas Hogg K.C., *Wootten* and *R. Mitchell Banks* for the suppliants. By the Army Act, 1881, s. 115, as amended and extended by the Army (Supply of Food, Forage and Stores) Act, 1914, the Naval Billeting, etc., Act, 1914, the Army (Amendment) Act, 1915, and the Army (Amendment) No. 2 Act, 1915, Parliament has made specific provision with regard to the requisitioning of the goods of a subject, and has enacted that any difference respecting the payment for the same is to be determined by a county court judge. The Crown, however, relies upon Regulation 2 B of the Defence of the Realm Regulations. That Regulation purports to be made under the Defence of the Realm Consolidation Act, 1914, which by s. 1 empowers His Majesty in Council to issue Regulations during the continuance of the war for securing the public safety and the defence of the realm. Sect. 1 enumerates four special matters in respect of which Regulations may be issued, but none of these covers the clause in Regulation 2 B which is relied upon by the Crown in this case, the clause, namely, which provides that "where any goods, possession of which has been so taken, are acquired by the Admiralty . . . . the price to be paid in respect thereof shall in default of agreement be determined by the tribunal by which claims for compensation under these regulations are, in the absence of any express provision to the contrary, determined." As originally issued, the Regulation did not contain this clause; and in its original form it was held to be intra vires in *Lipton* v. *Ford.* (1) In that case it was admitted on behalf of the Crown that these Regulations must, to be valid, be for the public safety and for the defence of the realm. It cannot be said of the material clause of Regulation 2 B that it provides for the public safety or for the defence of the realm. It is ultra vires as infringing the right of the subject to be paid the market price for his property and to have that price judicially determined in case of dispute. "It is a proper rule of construction not to construe an Act of Parliament as interfering with or injuring persons' rights without compensation, unless one is obliged to so construe it": per Brett M.R. in *Att.-Gen.* v. *Horner.* (2) The same principle was enunciated by Bowen L.J. in *London and North Western Ry. Co.* v. *Evans* (3), and by Lord Davey in *Commissioner of Public Works* (*Cape Colony*) v. *Logan* (4); see also *Reg.* v. *Abbott* (5). In *In re De Keyser's Royal Hotel* (6), the Court of Appeal held that the Crown is not entitled as of right either by virtue of its prerogative or under any statute, to take possession of the property of a subject and use it for administrative purposes in connection with the defence of the realm, without paying compensation for its use and occupation; and in *Central Control Board* (*Liquor Traffic*) v. *Cannon Brewery Co.* (1) the House of Lords decided that where licensed premises were acquired compulsorily under the Defence of the Realm Liquor Control Regulations the owners had a legal claim to be paid compensation, and were not limited to such compensation as might be granted to them as a matter of grace out of the public moneys on the recommendation of the Losses Commission. Regulation 2B purports to oust the jurisdiction of the Courts of law and set up a special tribunal. The Executive cannot by Regulation take away the jurisdiction of the Courts of law and cannot set up a new legal tribunal. Lord Westbury L.C. in *In re The Bishop of Natal* (2) said that "it is a settled constitutional principle or rule of law, that although the Crown may by its prerogative establish Courts to proceed according to the common law, yet that it cannot create any new Court to administer any other law; and it is laid down by Lord Coke, in the 4th Institute that the erection of a new Court with a new jurisdiction cannot be without an Act of Parliament." (3)

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(1) This regulation is set out in the headnote.

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(1) [1917] 2 K. B. 647.
(2) (1884) 14 Q. B. D. 245, 257.
(3) [1893] 1 Ch. 16, 28.
(4) [1903] A. C. 355, 363.
(5) [1897] 2 I. R. 362, 405.
(6) [1919] 2 Ch. 197.

Sir Ernest Pollock S.-G. and *Ricketts* (*Sir Gordon Hewart A.G.* with them) for the Crown. Regulation 2 B empowers the Crown to do what it has purported to do in this case. In *Lipton* v. *Ford* (4) the Regulation was held valid in so far as it gave power to the Crown to requisition food necessary for the use of the troops. Under s. 115 of the Army Act, 1881, the amount of payment for the article taken has to be determined by a county court judge. There is however no mention in that section of "fair market value." Payment under that section is only allowed for the articles actually taken, and no resulting loss can be considered. The schedule to the Army (Amendment) Act, 1915, provides that the amount of payment is to be the fair market value of the article on the day on which it is required to be furnished as between a willing buyer and a willing seller. If that standard of compensation is adopted, the suppliants' claim is, owing to the state of the market in rum in 1917, not warranted. This is not a case of contract or quasi-contract, and the Court cannot import into the transaction something from which a contractual relationship can be implied. Compensation cannot therefore be assessed on a contractual basis: see *Morgan* v. *Ravey*. (1) If a contract is to be implied at all, it must be a contract to pay for the goods in accordance with Regulation 2 B. That Regulation is intra vires. It was intended to empower the taking of goods by a shorter method than under the Army Acts. It also gives a right to the person whose goods are taken to compensation to be assessed by the Losses Commission. The Regulation was made in a time of stress when the greatest peril was the difficulty of raising money with which to carry on the war. Under the Defence of the Realm Consolidation Act, 1914, power was given to make Regulations for securing the public safety and the defence of the realm and to prevent the successful prosecution of the war being endangered. That covers financial considerations. The question as to military or financial necessity is exclusively determinable by the Executive: per Lord Parker in *The Zamora*. (2) If a Regulation is one that is reasonably capable of securing the public safety and defence of the realm the Court is not entitled to question the discretion of the Executive to whom Parliament has delegated powers in such wide terms: per Atkin J. in *Lipton* v. *Ford*. (3) This Regulation was intended to guard against the necessity of having to buy articles at famine prices. The word "price" as used in the Regulation does not mean market price, and such a meaning cannot be deduced from it: see *London and Yorkshire Bank* v. *Belton*. (4) The assessor of the amount to be paid under s. 115 of the Army Act is a persona designata—namely, the county court judge—and the change to another persona designata under Regulation 2 B

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(1) [1919] A. C. 744.

(2) (1865) 11 Jur. (N. S.) 353, 358; 3 Moo. P. C. (N. S.) 115, 152.

(3) They also argued that the Crown had no power by virtue of its prerogative to take the suppliants' property without paying the market price therefor. It is not, however, considered necessary to set out this argument, as counsel for the Crown, although not abandoning the Crown's prerogative rights in the matter, conceded that in this Court the point was not open.

(4) [1917] 2 K. B. 647.

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(1) (1861) 6 H. & N. 265.
(2) [1916] 2 A. C. 77, 107.
(3) [1917] 2 K. B. 654.
(4) (1885) 15 Q. B. D. 457.

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—namely, the Losses Commission—is no infringement of the liberty of the subject. This Court has no jurisdiction to fix the amount payable.

Hogg K.C. in reply. It must be taken that the suppliants were willing sellers and that the Admiralty were willing buyers: *Inland Revenue Commissioners* v. *Clay* (1); and the suppliants are entitled to be paid the market value of the rum. The use of the word "price" in the Regulation corroborates the view that the transaction is to be taken to be a contract of sale. On the question of the jurisdiction of this Court, *Feather* v. *The Queen* (2) shows that a petition of right is open to the subject where his land or goods have found their way into the possession of the Crown. That is also involved in *In re De Keyser's Royal Hotel.* (3) If the suppliants had gone to the county court they would have been met with the objection that no order had been made by a justice under s. 112 of the Army Act, 1881. For this purpose therefore the remedy by proceeding in the county court was non-existent: *Bentley* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (4); *Swansea Corporation* v. *Harpur* (5); *Central Control Board (Liquor Traffic)* v. *Cannon Brewery Co.* (6) The principle of those cases equally applies where persons are prevented from going to the particular tribunal: *Pulsford* v. *Devenish.* (7) All these cases are illustrations of the maxim ibi jus ibi remedium: see per Holt C.J. in *Ashby* v. *White.* (8) It is said by the Solicitor-General that one of the great difficulties during the war was the question of finance, and that the Regulation can therefore be supported on the ground that it was for the public safety and the defence of the realm. That argument involves this, that the Crown might levy what taxes it pleased without the consent of Parliament.

Sir Ernest Pollock S.-G. pointed out that the observations in *Feather* v. *The Queen* (2) relied upon by Mr. Hogg were obiter, and related to goods taken by the Crown as bona vacantia.

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(1) [1914] 3 K. B. 466, 473.
(2) (1865) 6 B. & S. 257, 293–4.
(3) [1919] 2 Ch. 197.
(4) [1891] 3 Ch. 222.
(5) [1912] 3 K. B. 493, 501.
(6) [1919] A. C. 744, 752.
(7) [1903] 2 Ch. 625.
(8) (1703) 2 Ld. Raym. 938, 953; 1 Sm. L. C. (12th ed.) 266, 286.

Cur. adv. vult.

1920. Feb. 12. SALTER J. read the following judgment:—On October 6, 1917, the suppliants, who are brewers and wine and spirit merchants at Newcastle, were the owners of about 658 puncheons of rum, mostly in bonded warehouses. By written notice of that date the Admiralty declared their intention to take possession of the whole of the suppliants' rum. By a written notice dated November 20, 1917, the Admiralty acquired 239 puncheons of the rum, subject to approval of its quality which was afterwards given. The suppliants claim the market value of the 239 puncheons thus acquired, and claim that the amount of such value shall be determined, unless agreed, by a Court of law. The Admiralty reject both claims. They have paid to the suppliants, without prejudice to the position of either party, a sum of 10,774*l.* 9*s.* 3*d.*, which is arrived at without reference to market value, and is not much more than one-third of the market value as alleged by the suppliants. The Admiralty say that no further sum is payable unless a further payment shall be advised or determined by the Royal Commission of Inquiry as to compensation in respect of loss or damage to property or business appointed by His Majesty by Command dated March 31, 1915.

The Solicitor-General, while reserving the matter for consideration elsewhere, did not rely in this Court on the Royal Prerogative. He relied on Regulation 2 B of the Defence of the Realm Regulations.

Up to the time of the making of this Regulation, the requisition of the subject's chattels by the naval and military officers of the Crown, and the rights and duties of the Crown and the subject in that case, were regulated by the following statutes. The Army Act, 1881 (44 & 45 Vict. c. 58), deals in Part III. with billeting and impressment of carriages. Sect. 112 deals with the impressment of carriages, animals and drivers to transport baggage and stores on the movement of troops in normal times. The statute contains a tariff of rates of payment. Sect. 115 deals with impressment of transport in emergency. The powers given are somewhat wider than in the case of ordinary impressment. No tariff is provided, but sub-s. 4 enacts as follows: "A Secretary of State shall cause due payment to be made for carriages, animals, and vessels furnished in pursuance of this section, and any difference respecting the amount of payment for any carriage, animal, or vessel shall be determined by a county court judge having jurisdiction in any place in which such carriage, animal, or vessel was furnished or through which it travelled in pursuance of the requisition."

By the Army (Supply of Food, Forage and Stores) Act, 1914 (4 & 5 Geo. 5, c. 26), the power of requisition given to the military authorities by s. 115 of the Army Act, 1881, is extended so as to include food, forage and stores of every description. By the Naval Billeting, &c., Act, 1914 (4 & 5 Geo. 5, c. 70), the right of emergency requisition given to the military authorities by the above-mentioned statutes is extended to the naval authorities. The Army (Amendment) Act, 1915 (5 Geo. 5, c. 26), amends s. 115, sub-s. 4, of the Army Act, 1881. The Army Council are to cause due payment to be made, and any difference as to amount is to be determined by a county court judge in accordance with the provisions of a schedule. This schedule provides that the amount of payment shall be such amount as appears to the county court judge to be the fair market value of the article requisitioned, as between a willing buyer and a willing seller, on the day on which it was required to be furnished. This Act received the Royal Assent on March 16, 1915. At that time, therefore, the Legislature is showing the plainest intention that persons whose goods are requisitioned in emergency by the naval and military officers of the Crown shall be paid in full, and that the amount payable shall, if disputed, be determined by a Court of law. This statute was inadvertently restricted to "carriages, animals, vessels and aircraft." This was put right by the Army (Amendment) No. 2 Act, 1915 (5 & 6 Geo. 5, c. 58), which substituted the word "articles."

It may be doubted whether the Army Act, 1881, was

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intended to give any right over the subject's chattels beyond a right of possession and user, but it is clear that the above statutes read together give the Crown the right to acquire the property in the subject's goods by way of requisition. If, therefore, this rum had been acquired before Regulation 2 B was made, the Admiralty must have proceeded under the above statutes, and the suppliants would have been entitled to the fair market value, to be determined, if necessary, in the county court.

Regulation 2 B, in its original form, was made on January 15, 1916. It has been added to five times. After the first addition, which was made on May 10, 1916, and before the addition which is now challenged, the Regulation read as follows: "It shall be lawful for the Admiralty or Army Council or the Minister of Munitions to take possession of any war material, food, forage and stores of any description and of any articles required for or in connection with the production thereof. If, after the Admiralty or Army Council or the Minister of Munitions have issued a notice that they have taken or intend to take possession of any war material, food, forage, stores, or article in pursuance of this Regulation, any person having control of any such material, food, forage, stores or article, sells, removes or secretes it, without the consent of the Admiralty, or Army Council, or the Minister of Munitions, he shall be guilty of an offence against these Regulations."

It is necessary for me to consider this Regulation only so far as it affects the rights and duties of the Crown and the subject in the case of the requisition of food and stores by the naval and military authorities.

I think that the effect of the Regulation as it then stood is that these officers may exercise the rights of possession, user and acquisition given to them by the above-named statutes in a summary manner, and without resort to the procedure there prescribed, but that the right of the subject to the market value, and to a judicial decision, is unaffected by the Regulation.

The second addition to the Regulation, the part which is now challenged, was made on February 23, 1917, and is in the following terms: "Where any goods, possession of which has been so taken, are acquired by the Admiralty or Army Council or the Minister of Munitions, the price to be paid in respect thereof shall in default of agreement be determined by the tribunal by which claims for compensation under these regulations are, in the absence of any express provision to the contrary, determined. In determining such price regard need not be had to the market price, but shall be had: (*a*) If the goods are acquired from the grower or producer thereof, to the cost of production and to the rate of profit usually earned by him in respect of similar goods before the war and to whether such rate of profit was unreasonable or excessive, and to any other circumstances of the case; (*b*) if the goods are acquired from any person other than the grower or producer thereof, to the price paid by such person for the goods and to whether such price was unreasonable or excessive, and to the rate of profit usually earned in respect of the sale of similar goods before the war, and to whether such rate of profit was unreasonable or excessive, and to any other circumstances of the case; so, however, that if the person from whom the goods are acquired himself acquired the goods otherwise than in the usual course of his business, no allowance, or an allowance at a reduced rate, on account of profit shall be made. Provided that where, by virtue of these regulations or any order made thereunder the sale of the goods at a price above any price fixed thereunder is prohibited the price assessed under this regulation shall not exceed the price so fixed."

It is contended that the whole of this part of the Regulation is invalid. I have therefore to determine whether it is within the legislative powers delegated by the Defence of the Realm Consolidation Act, 1914. This Act gives temporary power to the Crown in Council to issue Regulations for securing the public safety and the defence of the realm, and to provide for the trial and punishment of persons offending against the Regulations and, in particular, against any of the provisions of such Regulations designed (*a*) to prevent spying and communication with the enemy, (*b*) to secure the safety of the forces, communications and harbours, (*c*) to prevent the spread of false or mischievous reports, (*d*) to secure the proper navigation of vessels, (*e*) otherwise to prevent assistance being given to the enemy or the successful prosecution of the war being endangered. Sub-sections (*a*), (*b*), (*c*), (*d*) and (*e*) are particular classes of the general class defined by the Act. They are not exhaustive, but they throw some light on the kind of Regulations which Parliament had in contemplation. The word "designed" must mean "framed" and not "intended." If it were enough that the authors of a Regulation intended it to conduce to the public safety, the mere making of the Regulation would establish its validity.

The test to be applied is whether this part of Regulation 2 B is reasonably capable of being a Regulation for securing the public safety and the defence of the realm. If it is, it is valid, and the Crown in Council is the sole judge of its expediency. It is certainly valid if it is reasonably capable of being a Regulation "designed to prevent . . . . the successful prosecution of the war being endangered": see *Lipton* v. *Ford* (1) and *Chester* v. *Bateson*. (2)

I will take first the part of the Regulation which deals with the right to a judicial decision. The reference to the tribunal is obscure, but I think the words must be taken to refer to the Commission appointed by the Royal Warrant dated March 31, 1915. By that Warrant the Commissioners are empowered and directed to inquire, determine and report what sums (in cases not otherwise provided for) ought in reason and fairness to be paid out of public funds in respect of direct and substantial loss incurred and damage sustained by subjects by reason of interference with their property or business through the exercise by the Crown of its rights and duties in the defence of the realm. The Commissioners, as appears from their Report dated September 19, 1916, regarded these instructions as excluding from their jurisdiction all claims in which any statutory or contractual right to payment or compensation existed or was alleged. I think that the effect

(1) [1917] 2 K. B. 647, 654.

(2) Ante, p. 829.

of this part of the Regulation, if it is valid, is to deprive the subject of the right to the market value of his goods given to him by the above-named statutes, and further to deprive him of any legal right to payment or compensation, and to give him permission (which he does not need) to go to the Losses Commission and ask for some ex gratia payment by reason of interference with his property or business.

The Solicitor-General, however, contended that the meaning of this part of the Regulation is that the subject retains a legal right to payment to be assessed in accordance with the Regulation, but that the assessment is transferred from the county court judge to the members for the time being of the Losses Commission as arbitrators. I do not think this is the meaning of the words used, but on either reading I think that this part of the Regulation is ultra vires. I do not think that a Regulation which takes away the subject's right to a judicial decision, or transfers the adjudication of his claim, without his consent, from a Court of law to named arbitrators, could fairly be held to be a Regulation for securing the public safety and the defence of the realm, or a Regulation designed to prevent the successful prosecution of the war being endangered, within the meaning of these words in the Defence of the Realm Consolidation Act, 1914.

In *Chester* v. *Bateson* (1) it was decided that Regulation 2 (*a*) (2.) of these Regulations is invalid. The judgments in that case are, in substance, applicable here. That Regulation deprived a class of subjects, in certain circumstances, of their common law right of access to the Courts. This Regulation takes away a right of access to a particular Court given in express terms by a recent statute.

The remaining part of the Regulation deals with payment. It deprives the owner of his statutory right to the fair market value, and directs, in effect, that the sum to be paid shall be based on the cost price, and not on the market price, of the goods acquired. It is plain that this provision may deprive the subject of part (and not improbably a large part) of the sum to which he was entitled by statute, and that it authorizes for an indefinite time the taking by the Crown of the subject's goods without payment of the pecuniary equivalent at the time of requisition. It is an established rule that a statute will not be read as authorizing the taking of a subject's goods without payment unless an intention to do so be clearly expressed: see *Attorney-General* v. *Horner* (1); *London and North Western Ry. Co.* v. *Evans* (2); *Reg.* v. *Abbott* (3); *Commissioner of Public Works* (*Cape Colony*) v. *Logan.* (4) This rule must apply no less to partial than to total confiscation, and it must apply a fortiori to the construction of a statute delegating legislative powers. If it was intended in August, 1914, to authorize a regulation permitting the officers of the Crown to take the subject's goods without payment in full it is strange that Parliament should have been occupied in March, 1915, in making careful provision for the assessment and payment of the fair market value in case of emergency requisition. A power to take the goods of a particular subject, or class of subjects, without payment of the then cash value, is a power of taxation by the Executive. If it had been intended that the Defence of the Realm Consolidation Act, 1914, should confer such a power as this, I think that more precise language would have been employed.

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(1) Ante, p. 829.

For these reasons I think that the whole of that part of Regulation 2 B which has been attacked is ultra vires, so far as it purports to deprive persons whose goods are requisitioned by the naval or military authorities of their right to the fair market value, and to a judicial decision of the amount.

Sect. 115, sub-s. 4, of the Army Act, 1881, as amended by s. 2, sub-s. 1, of the Army (Amendment) Act, 1915, provides that where a sum has been paid or tendered by the Army Council under that sub-section, that sum shall be deemed to be the amount due unless application is made to the county court within three weeks from the date of payment or tender. In this case I think that no payment or tender has been made under that sub-section. The suppliants might have gone to the county court in the first instance, but seeing that the

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(1) 14 Q. B. D. 245, 257.

(2) [1893] 1 Ch. 16, 28.

(3) [1897] 2 I. R. 362, 405.

(4) [1903] A. C. 355, 363.

Admiralty consistently denied their right to the market value and to the decision of that Court, I think they were entitled to come here and ask for a declaration of their rights.

I see no evidence that there has been any discussion, much less any difference, between the parties as to the amount of the fair market value. If there has been, or shall be, such difference, Parliament has enacted that it shall be determined by another authority. For both these reasons I think I have no jurisdiction to fix the fair market value or to direct an inquiry for that purpose.

I make the following declarations: (1.) By virtue of the provisions of the Army Act, 1881; the Army (Supply of Food, Forage and Stores) Act, 1914; the Naval Billeting, etc., Act, 1914; the Army (Amendment) Act, 1915; and the Army (Amendment) No. 2 Act, 1915, the suppliants are entitled to be paid the fair market value of the 239 puncheons of rum acquired from them by the Admiralty. (2.) By virtue of the provisions of the aforesaid Acts, the suppliants are entitled, in the event of dispute as to the amount of such market value, to have the same fixed by a county court judge in accordance with the said provisions.

There will be judgment for the suppliants accordingly.

Judgment for suppliants.

Solicitors for suppliants: *Godden, Holme & Ward.*
Solicitor for Crown: *Treasury Solicitor.*

J. S. H.

C. A.
1919
Nov. 5, 11, 20

[IN THE COURT OF APPEAL.]

In re AN ARBITRATION BETWEEN

COMPTOIR COMMERCIAL ANVERSOIS

AND

POWER, SON AND COMPANY.

Sale of Goods—Implied Term—Sale of Wheat in United States—Shipment to Belgium—Payment against Shipping Documents—Inability to Sell Exchange Owing to War—Implied Term that Contract is to be Dissolved—Question of Law.

By eight contracts in similar form, made in June and July, 1914, a firm of merchants in New York sold to a Company which carried on business at Antwerp a quantity of wheat to be shipped during August and not later than the middle of September, 1914, from an Atlantic and/or Canadian port at sellers' option, under one contract to Rotterdam and under the rest to Antwerp, at a price free on board including freight and insurance, to be paid net cash on presentation of bills of lading and/or delivery order. The contracts provided that the sellers were to furnish marine policies of insurance for two per cent. over invoice amount; and they contained the following clauses:—"In the event of war, should sellers not have received from buyers approved English and/or American policies . . . . for approximate invoice amount covering war risk three days prior to shipment, sellers shall have the right, if they think fit, and are able, to cover war risk for account and risk of buyers." "In case of prohibition of export, force majeure, blockade, or hostilities preventing shipment, this contract or any unfulfilled part thereof shall be at an end."

At the beginning of August the sellers cabled to the buyers that they could not effect insurance against war risks and that they were therefore unable to sell the drafts, and asking the buyers to arrange for payment in New York. The buyers refused, and the sellers on August 6 cancelled the contracts. The buyers claimed damages for breach of contract. The dispute was referred to arbitration in London under a clause in the contracts. The wheat was in fact shipped, but for other buyers and for other ports. The sellers claimed that they were entitled to treat the contracts as cancelled as they were unable to sell in America exchange on Rotterdam or Antwerp. The arbitrators found that the business of exporting grain from America to Europe was based upon the sale of exchange in America, and it had long been a well-recognized usage or custom for shippers of grain from America to sell or negotiate the exchange to or with an exchange buyer in America, and the sale of wheat could not be carried out unless such exchange were possible, and it was an implied term and/or condition of the contracts that the sellers should at all material times be able to sell or negotiate the exchange; that the buyers were aware of this usage or custom at the time when the contracts were made; that from August 1 to 6 inclusive when the sellers claimed to cancel the contracts they were unable to sell exchange on Antwerp or Rotterdam, and this inability continued throughout the whole period for shipment provided by the contracts; that from August 1 to 6 inclusive no war insurance could have been effected by the sellers on the shipments; that the commercial purpose of the adventure so far as the sellers were concerned became frustrated by the impossibility in the circumstances prevailing of their being able to sell or negotiate exchange in America; that this impossibility and the circumstances prevailing were caused by hostilities; and that shipment was prevented by hostilities within the meaning of the prohibition clause in the contracts. They accordingly made an award in favour of the sellers.

Held, first, that the shipment was not "prevented" by hostilities within the meaning of the prohibition clause in the contracts, "prevention" there meaning a physical or legal prevention.

Held, secondly, that the question whether a term should be implied in the contracts providing for their dissolution on the ground of the frustration of the commercial adventure was a question of law for the Court; and that, as the buyers were not concerned with the general method by which the sellers financed their exports of wheat to Europe, and considering that the contracts contained a provision as to insurance of war risks in the event of war, a term or condition could not be implied in the contracts that if the sellers were unable to sell the exchange the contracts should be determined.

APPEAL from the judgment of Bailhache J. on an award in the form of a special case.

The Comptoir Commercial Anversois Société Anonyme of Antwerp (hereinafter called the buyers) were merchants who carried on business at Antwerp, and Power, Son & Co. (hereinafter called the sellers) were merchants carrying on business in New York. By eight contracts, dated respectively June 23, July 13, 13, 14, 27, 27, 28, and 30, 1914, the sellers sold to the buyers certain wheat, totalling 18,500 quarters, shipments to be made during August up to September 14, from an Atlantic and/or Canadian port or ports at sellers' option, at a certain price per 100 kilos free on board including freight and insurance, the first contract providing for shipment to Rotterdam and the others to Antwerp. The contracts were all in the same form, and contained the following clauses:

"Reimbursement net cash on presentation of bill or bills of lading and/or delivery order."

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"Should draft be presented with incomplete set of bill or bills of lading attached, payment shall be made provided bankers, or Power Bros. & Co., Ld., through their authorized agents, guarantee the delivery in due course of the bill or bills of lading not attached, or hold buyers harmless for any direct loss caused by their taking up the incomplete set of bill or bills of lading."

"Marine Insurance: Sellers to furnish policies and/or certificates of insurance (free of war risk) for 2 per cent. over invoice amount (any surplus over this to be for sellers' account in case of total loss only) effected with approved underwriters and/or companies, but for whose solvency sellers are not responsible."

"In the event of war, should sellers not have received from buyers approved English and/or American policies (if American, losses shall be payable in England) for approximate invoice amount covering war risk three days prior to shipment, sellers shall have the right, if they think fit, and are able, to cover war risk for account and risk of buyers."

"In case of prohibition of export, force majeure, blockade, or hostilities preventing shipment, this contract or any unfulfilled part thereof shall be at an end."

The contract further provided that any dispute arising, including any question of law, should be settled by arbitration in London under the Arbitration Rules of the London Corn Trade Association in force at the date of the contract.

The sellers claimed to cancel the contracts under the circumstances hereinafter mentioned, and the buyers claimed damages for breach of the contracts, and the disputes thus arising were referred to arbitration under the contract, and the arbitrators awarded that the buyers had no claim against the sellers in respect of the non-shipment of the wheat under the contracts. The buyers appealed to the Appeal Committee of the London Corn Trade Association in accordance with the rules of the Association, and the Committee stated their award in the form of a special case.

The special case, after setting out the facts above mentioned, proceeded, so far as material, as follows:

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" 9. The contracts provide for shipments to be made during August and up to the 14th September, 1914.

" 10. On the 1st August, 1914, the sellers cabled to the buyers tendering the s.s. *Millpool* to fulfil the contracts of the 28th and 30th July, 1914. The sellers had, in fact, entered into a charterparty on the 8th May, 1914, with Messrs. R. Ropner & Co., of London, for a first-class steamer to load a cargo from Montreal to Avonmouth, Rotterdam, Antwerp, Hamburg, Bremen, Dunkirk or Havre, one port only, and Messrs. R. Ropner & Co. had tendered the steamship *Millpool* under the terms of that charterparty.

" On the 2nd August, 1914, the sellers cabled to the buyers stating that they could not sell the draft or cover war risk, and asking the buyers to arrange payment in New York, and to cable immediately.

" 12. On the 4th August the buyers cabled to the sellers that they were sorry it was impossible to arrange payment in New York.

" 13. On the same day, the 4th August, the sellers cabled to the buyers that they must procure immediately satisfactory war risk insurance or payment New York, or the sellers would have to consider sales as cancelled, and on the same day the sellers cabled to the buyers insisting on payment in New York or they would treat the contracts as cancelled.

" 14. On the 5th August the sellers cabled referring to their contracts of the 13th, 14th, and 27th July tendering the *Millpool* and/or *Stanley* in respect of those contracts, and in respect of the contract of the 23rd June tendering the steamers *Burrsfield*, *Stanley*, and/or *Zuyderdyk*, and they proceeded to state in the cable that it was impossible to insure the war risks, and if no immediate remittance was made to New York by the buyers they would cancel the contracts.

" 15. On the 6th August the buyers cabled to the sellers stating that it was impossible to pay in New York or take decision, and that they held themselves to the contract, and on the same day, probably on receipt of the last-mentioned cable, the sellers cabled to the buyers : 'The present notifies cancellation of contracts as tendered by cable.'

" 16. On the 7th August the buyers cabled to the sellers that they were sorry it was impossible to confirm, holding themselves to the contract, which stipulated payment on presentation of documents.

" 17. On the 10th August the buyers again cabled to the sellers that the British Government declared navigation open to all Belgian ports. . . . .

" 18. On the 14th August the buyers again cabled protesting against the cancellation of the contracts, and holding the sellers responsible for the consequences. . . .

" 20. On the 24th August the sellers cabled the buyers that they had no contracts to fulfil, and on the 26th August the buyers cabled the sellers that they would arbitrate the unfulfilled contracts, and naming an arbitrator.

" 21. All the cables referred to may be treated as part of this case.

" 22. The sellers had in fact shipped the wheat which they had tendered as aforesaid, but claimed that they were absolved from any further performance of the contracts as they were prevented by force majeure or hostilities from making shipments to Rotterdam and Antwerp as contemplated by the contracts in that they were unable to sell in New York exchange on Rotterdam or Antwerp.

" 23. The sellers put in evidence in support of such contention certain certificates from bankers and others which are attached to and can be referred to as part of this case. (1) It was also proved by the sellers that in no circumstances would the banks in New York buy exchange on Rotterdam or Antwerp unless the goods shipped were insured against war risks, and they also produced evidence that war risk insurance on merchandise destined to Antwerp or neighbouring continental ports was not procurable between August 4th and 11th at practicable rates.

" 24. On the other hand the buyers contended that it was no concern of theirs whether the sellers could sell their exchange or effect war insurance, and that they were not bound to pay in New York, ... and they produced a certificate from the port of Antwerp as to vessels which had entered that port between the 6th August and 7th October, 1914, ... and a list of steamers which arrived at Antwerp between the 4th August and 15th September, 1914, certified by the Administration of the Belgian Marine. These documents are annexed to this case, and may be referred to as part of it.

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(1) In view of the findings of the Appeal Committee it is not considered necessary to set out the certificates.

"25. It was contended on behalf of the sellers: 1. That it was not the custom of American shippers of grain to finance their own shipments to Europe, but that the course of business customary in the trade, and which was well known both to buyers and sellers at all material times, is for a seller who has sold goods on the terms contained in the said contracts to sell or negotiate the exchange to or with an exchange buyer in America, and that owing to the position which had arisen upon and continued after the outbreak of war it was impossible at all material times for sellers to sell or negotiate the said exchange to or with any exchange buyer or bank in America, as no one would buy or negotiate such exchange, and as all business with regard to the sale or negotiation of bills drawn on Antwerp or Rotterdam was closed. 2. That it was an implied term and/or condition of each of the said contracts that the sellers should at all material times be able to sell or negotiate the exchange. 3. That the whole commercial purpose of the venture, so far as the sellers were concerned, became frustrated by the impossibility of selling the exchange in America owing to the conditions prevailing. 4. That the impossibility of selling or negotiating the said exchange, the closing of the business referred to in (1.) above and the frustration referred to in (3.) above were in each case caused by hostilities. 5. That the shipment under each of the said contracts was prevented by hostilities within the meaning of the prohibition clause in the contracts.

"26. It was contended on behalf of the buyers: 1. That the buyers committed no breach, and intimated no intention to commit a breach of their contract, and that the sellers did not contend to the contrary. 2. That the sellers refused to ship under the contracts on the ground that the buyers refused to pay cash in New York (see cables above). 3. That there was no condition either express or implied in the contracts that the sellers should be able to sell exchange in America. 4. That there was no evidence or no sufficient evidence before the Appeal Tribunal of the custom or course of business alleged by the sellers; there was no evidence that such custom or course of business was known to the buyers. 5. That the said alleged custom or course of business is inconsistent with the contract. 6. That the said alleged custom or course of business is unreasonable. 9. That there was no frustration of the commercial purposes of the contracts.

"27. In addition to the facts above found we (the Appeal Committee) find the following:

"1. The business of exporting grain from America to Europe is based upon the sale of exchange in America, and it has long been a well-recognized usage or custom for shippers of grain from America to sell or negotiate the exchange to or with an exchange buyer in America, and the sale of goods provided for in the contracts in question could not be carried out unless such exchange were possible, and it was an implied term and/or condition of the contracts in question that the sellers should at all material times be able to sell or negotiate the exchange.

"2. The buyers were aware of the above usage or custom at the time the contracts were made.

"3. The sellers shipped all the goods under the said contracts in accordance with their tenders. (1)

4. From the 1st to the 6th August, 1914, inclusive, when the sellers claimed to cancel the contracts, they were unable to sell exchange on Antwerp or Rotterdam.

"5. Such inability to sell exchange continued throughout the whole period for shipment provided by the said contracts.

"6. From the 1st to the 6th August, 1914, inclusive, no war insurance could have been effected by the sellers on the said shipments.

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(1) See the explanation of this finding in the judgment of Bailhache J.

"12. That the commercial purpose of the adventure, so far as the sellers were concerned, became frustrated by the impossibility in the circumstances prevailing of their being able to sell or negotiate exchange in America.

"13. That such impossibility and the circumstances prevailing were caused by hostilities.

"14. That shipment was prevented by hostilities within the meaning of the prohibition clause in the contracts."

Subject to the opinion of the Court, the Appeal Committee confirmed the award of the arbitrators. If the Court should be of opinion that their award was wrong, then they set aside the award of the arbitrators, and awarded that there was a breach by the sellers of the contracts, and that the buyers were entitled to damages, which they assessed at 101,32 francs.

June 5, 1919. BAILHACHE J. read the following judgment: In this case the Comptoir Commercial of Antwerp, the buyers, had in August, 1914, eight contracts for the purchase of wheat open with Messrs. Power, Son & Co. of New York. The contracts were all in the same form, so far as is material for the purpose of my decision. They called for shipment at varying times between July and the first half of September, 1914. None of the wheat was shipped in July. In August it was found to be impossible to cover war risk by insurance upon cargoes for Holland and Belgium, the destination of the wheat in question. It was consequently impossible for the sellers to sell exchange, and they declined to ship the wheat to the buyers, who proceeded to arbitration, claiming damages for breach of contract. The matter comes before me upon a case stated by the Appeal Committee of the London Corn Trade Association, to whom the dispute was referred. The arbitrators have found in the sellers' favour. One of their findings, namely the finding that the sellers shipped all the goods under the said contracts in accordance with their tenders, requires a little explanation. Under the

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contracts the wheat is sold f.o.b., including freight and insurance, but the practice appears to be for the sellers to arrange for or nominate the carrying steamships. This they did, and they shipped the contractual wheat upon those steamships, but for other buyers, and, I am told, to United Kingdom ports. The findings with which I am oncerned are those relating to the sale of exchange, and they are (1.) that it was an implied term of the contracts that the sellers should at all material times be able to sell or negotiate the exchange upon the ground that the business of exporting grain from America to Europe is based upon the sale of exchange in America ; that it was a well-recognized custom for shippers of grain from America so to do ; and that unless the sale of exchange were possible, the contracts in question could not be carried out, and that the buyers knew of the custom ; (2.) that the inability to sell exchange was due to the impossibility of effecting war risks insurance ; (3.) that the commercial purpose of the adventure, so far as the sellers were concerned, became frustrated by the impossibility of selling exchange ; (4.) that such impossibility was caused by hostilities ; (5.) that shipment was prevented by hostilities within the meaning of the prohibition clause in the contract.

The points for consideration, therefore, are two : First, whether the doctrine of commercial frustration applies ; secondly, whether the prohibition, or, as I prefer to call it, the exception clause, excuses the sellers. These two questions are quite separate, and depend upon entirely different considerations ; and I respectfully venture to think that the very competent arbitrators in this case have to some extent allowed the two to mingle. I am led to this conclusion by this finding, that the impossibility of selling the exchange was caused by hostilities, a phrase borrowed from the exception clause. If the sellers are protected by the exception clause, it must be because, as a matter of construction, that clause covers the circumstances of this case. If they are protected by the doctrine of frustration, it must be because of an implied term to be read into the contract. The arbitrators have found there was such an implied term. I will deal with the express exception clause first; but, before doing so, in order to make my judgment more intelligible, I will state what the sale of exchange in such a case as this means. The arbitrators, knowing, no doubt, all about it, have not thought it necessary to do more than refer to it as an established usage.

The seller, upon shipment of the goods, procures a bill of lading. He makes out an invoice, and draws a draft upon the buyer of the goods, in this case presumably payable at sight, as the terms of payment are net cash on presentation of bill of lading. He also effects an insurance policy. Armed with these documents, he goes to a buyer of exchange and sells the draft to him. The bill of lading is attached to the draft, and the exchange buyer sends the documents to his agent at the buyer of the goods end. The buyer of the goods, if the documents are in order, pays or accepts the draft, as the case may be, takes the bill of lading and invoice, and the transaction is ended. The object of the seller of the goods is to get his money as soon as the goods are shipped and without waiting until the documents reach the buyer of the goods. The exchange buyer does not buy the goods or the bill of lading. The latter he holds as security until the buyer of the goods honours the draft upon him. The risks the exchange buyer runs are, the inability of the goods buyer to take up the draft and the further risk that the documents may be refused as not being in order; for example, the bill of lading may be out of due date. It is most material, therefore, to the exchange buyer that he should be fully secured by the goods the subject-matter of the draft. This, of course, he cannot be without a policy of insurance; and it is obvious that in time of war he will want a policy which covers war as well as marine risks. It is thus easy to see how the inability of the sellers to procure a war risks policy prevented their selling the exchange. The buyer has no concern with this selling of exchange. It does not affect his position in any way. His contract with his seller is not varied by it in any degree. The sale of exchange is purely a matter of the financial arrangements which the seller makes to enable him to carry on his business. It will be observed that the buyer of exchange does not come on the scene until after the goods have been shipped and insured; for he must have both bill of lading and insurance policies before he will look at the draft he is asked to buy.

I now proceed to inquire whether the inability to sell exchange comes within the exception clause in these contracts. The words are: "In case of prohibition of export, force majeure, blockade, or hostilities preventing shipment, this contract . . . . shall be at an end." So there was nothing in this case to prevent shipment, except the inability to sell exchange, and the arbitrators, in finding that "shipment was prevented by hostilities within the meaning of the prohibition clause," must be basing themselves upon this inability. Now, if I give to the word "shipment" the widest meaning of which it is capable, it cannot mean more than bringing the goods to the shipping port and then loading them on board a ship prepared to carry them to their contractual destination. It is this, or some part of this, which has to be prevented by hostilities, to bring the sellers within the clause. The remaining question is, what does "prevent" in this connection mean? Now, both upon authority, and as a matter of construction apart from authority, I am of opinion that as used in this clause "prevention" means either physical or legal prevention. Inability to sell exchange is neither the one nor the other. Moreover, as I have pointed out, inability to sell exchange does not arise in respect to any given cargo until such cargo is shipped. I think the finding of the arbitrators on this point is wrong.

It remains to consider the frustration of adventure point. This is more difficult, because one has to speculate upon what would have happened if the parties had discussed a difficulty which it is quite possible in some cases, at any rate, was not present to the minds of either of them. In embarking upon this speculation, one must bear in mind that impossibility of performance by one party, not due to supervening illegality, is not of itself a ground for holding that the commercial object of the venture is frustrated. Nothing, in my opinion, is more dangerous in commercial contracts than to allow an easy escape from obligations undertaken; and I desire to reiterate what the older judges have so often said, that parties must be held strictly to their contracts; it is their own fault if they have not adequately protected themselves by suitable language. This view has been very forcibly repeated by McCardie J. in *Blackburn Bobbin Co.* v. *Allen & Sons* (1), and is, in my opinion, a view deserving more than mere lip-service. Another thing to be remembered is that, the doctrine of frustration depending as it does upon implied contract, the question the Court has to ask itself is: Would two reasonable men making the contract in question have both agreed, if asked at the time of making it, that in the events which have happened the contract, or its further performance, was to be considered as at an end, for frustration puts an end to the contract and absolves both parties from further liability under it? The limitation on the right of the Court to imply a term in a contract cannot, I think, be better expressed than in the language of A. T. Lawrence J. in *Scottish Navigation Co.* v. *Souter & Co.* (2), approved by Lord Sumner in *Bank Line* v. *Capel & Co.* (3) A. T. Lawrence J. puts it thus: "No such condition should be implied when it is possible to hold that reasonable men could have contemplated the circumstances as they exist and yet have entered into the bargain expressed in the document." It is also true that the term to be implied must not be in conflict with any express term in the contract; although it may, and indeed must, if it is to be of any use, add to or vary it.

Bearing these principles in mind, I ask myself would the sellers and buyers in this case have both agreed that, if the sellers were unable to sell exchange, the contract was to be at an end? Before I answer it, I will look at the contract as expressed, to see if the contract has dealt with the point in such a way as either to preclude the implied term or to give any guide as to what the answer should be. I find that

(1) [1918] 1 K. B. 540, 543.

(2) [1917] 1 K. B. 222, 249.

(3) [1919] A. C. 435, 460.

in the exception clause the only excuses for non-performance are, as I have indicated, legal or physical; and that these are limited to shipment. There is moreover another clause which runs thus: "In the event of war, should sellers not have received from buyers approved English and/or American policies . . . . for approximate invoice amount covering war risk three days prior to shipment, sellers shall have the right, if they think fit, and are able, to cover war risk for account and risk of buyers." I note in passing that "shipment" here obviously means the act of putting the goods on board, and this is, I think, its meaning in the exception clause. Now I am not prepared to hold, after the time charterparty cases, that either of these clauses, or both together, preclude the implication of a clause determining the contract in the event of the impossibility of selling exchange; but they are, I think, a valuable guide in deciding whether both parties would have agreed to such a clause. I find it difficult to suppose that whoever is responsible for settling this form of contract had not in view in the insurance clause the need of a war risks policy to enable the sellers to sell the exchange. However that may be, I note that the buyers are not bound to procure a policy; and I note that both parties contemplate there may be difficulty about it. The clause, further, is remarkable for what it omits. It says nothing about non-shipment if a policy cannot be effected, and I ask myself why? The answer, I think, is that the clause expresses the whole length to which both parties were prepared to go in common agreement. The sellers could not press the matter further.

Going back now to the question I have asked myself, impossibility of selling exchange would be an equal inconvenience to the seller, whatever the cause. Suppose dealers in exchange refused to do business because of a panic in the New York money market, would the buyers have agreed that in such a case the contract was dissolved? I should say certainly not. In my opinion that would not be business. Yet the impossibility of performance would be the same. Now suppose the question to be limited to impossibility of selling exchange due to war or hostilities. The answer is perhaps not so plainly, No; but I think the buyers' answer would be: Your selling exchange is no concern of ours, although we know that is the way you carry on your business. You do it entirely for your own convenience; and by the exception clause and the war risks insurance clause we have protected you in the event of war to the full extent to which you are entitled, and will go no further. In truth, I find it very difficult to suppose the sellers asking the question at all, if they realized the result to themselves of an affirmative answer. For consider: frustation not only excuses the seller from performance, but dissolves the contract. The implied term must be: In the event of the impossibility of selling exchange due to hostilities, the contract is at an end. The buyer, to whom the sale of exchange is a matter of complete indifference. would say in such a case: I decline to take delivery. You, the seller, cannot sell exchange, and although you may tender the documents through your own banker, or even send them to me direct, I will have none of them. Apart from what seems to me the business absurdity of such a position, I much doubt whether the seller would accept a clause which put him, in such an event, at the buyer's mercy. I do not believe a seller of wheat, presumably able to finance his own shipments, would agree to have all his contracts thrown on his hands by the outbreak of war unless he could procure war risks insurance and so sell exchange.

I notice that the arbitrators do not find that the commercial purpose of the adventure was frustrated, but limit themselves to saying "so far as the sellers were concerned." I do not see how they could do otherwise, but a finding so limited does not go far enough; it is necessary that there should be frustration of the common purpose of the adventure. I know of no case where the doctrine of frustration has been applied where the event relied on as frustration has related to a purpose or object which one of the contracting parties had in mind as necessary to the fulfilment of his contract to the knowledge of the other, but whose attainment was no part of the contract to the performance of which both parties had expressly bound themselves; and the attainment or non-attainment of which purpose would not in any material respect alter any of the obligations which the parties had inter se mutually undertaken, but would leave the performance of the contract as between the parties to it essentially unchanged. I ought, perhaps, to notice that the clause as to war risks insurance precludes the suggestion that the parties to these contracts were relying upon the continuance of a state of peace, although I think in this case the point is immaterial.

In my judgment there was no such implied term as the arbitrators find, and the doctrine of frustration does not apply for the reasons I have given. I think the award was wrong as made, and that the alternative award made in favour of the buyers must stand, and I give judgment in the form of the alternative award.

The sellers appealed.

Stuart Bevan K.C. and *Paley Scott* for the sellers. There is an implied term in the contracts that the sellers shall be relieved of the duty of performing the contracts if they are unable to sell the exchange. The arbitrators have found as facts that the business of exporting grain to Europe from America was based upon the sale of exchange in America, that the contracts could not be carried out unless the sale of exchange was possible, that it was a recognized usage or custom for shippers of grain from America to sell the exchange to an exchange buyer in America, and that the buyers knew of this usage or custom when the contracts were made. "Custom" there means universal practice, and it is important as bearing upon the necessity of implying a term to the above effect. The sellers of grain in America could not afford to wait for payment until the grain arrived in Europe; they could only carry on their business on the terms of payment when the grain was shipped. They could not carry out the adventure in a commercial sense except upon those terms. These are findings of fact with which the Court cannot interfere. In *Jackson* v. *Union Marine Insurance Co.*(1) the question whether the time necessary to get the ship off and repair her so as to be a cargo-carrying ship was so long as to put an end in a commercial sense to the commercial speculation was left to the jury, and this course was approved in the Exchequer Chamber where Bramwell B., who delivered the judgment of the majority of the Court, said (2) that the finding of the jury was "all-important." A similar finding was arrived at by the arbitrators in *Admiral Shipping* v. *Weidner, Hopkins & Co.*(3); and in *Bank Line* v. *Capel & Co.*(4). Lord Sumner seemed to think that the question was for the jury upon a proper direction. The question is really one of fact which is concluded by the findings of the arbitrators. If the contract could not be carried out unless the vendors could sell the exchange, then the provision which the parties must have made if they had contemplated that event was that in that event the vendors should be excused from delivery.

[SCRUTTON L.J. It is the duty of the Court to construe a contract with the aid of the surrounding circumstances found by the jury or other tribunal whose function it is to find the facts: *Behn* v. *Burness*.(5)]

The circumstances here are that these contracts would not have been entered into if the buyers had stipulated to have the goods whether the vendors could sell the exchange or not. The question of law is whether the implied term is inconsistent with the express terms of the contract. [*Oppenheim* v. *Fraser* (6); *Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (7); *Blackburn Bobbin Co.* v. *Allen* (8); and *Bassano Zuccotti & Co.* v. *Carruthers* (9) were also referred to.]

Next, the clause determining the contracts in case of "hostilities preventing shipment" is not confined to a physical or legal prevention. Prevention in a commercial

(1) (1873) L. R. 8 C. P. 572, 575.
(2) (1874) L. R. 10 C. P. 125, 141.
(3) [1917] 1 K. B. 222, 228.
(4) [1919] A. C. 435, 459.
(5) (1863) 3 B. & S. 751, 756.
(6) (1876) 34 L. T. 524.
(7) [1916] 2 A. C. 397.
(8) [1918] 2 K. B. 467.
(9) An unreported case before Sankey J. November 25, 1918.

sense is sufficient to bring the case within the clause. The arbitrators have found that there was a prevention in that sense. The case comes within the words of Swinfen Eady L.J. in *Scottish Navigation Co.* v. *Souter & Co.* (1): "Here a contract has been entered into which by a supervening cause beyond the control of either party has become impossible or impracticable in a commercial sense . . . . upon the occurrence of that cause both parties were and are excused from any further performance." [*Tennants (Lancashire) Ltd.* v. *Wilson & Co.* (2) was also referred to.]

C. W. Lilley for the respondents, the buyers. There is no evidence to support the finding that these particular contracts could not have been carried out unless the vendors could sell the exchange. It does not follow that, because the trade as a whole depends upon the existence of a state of circumstances, therefore any particular contract is similarly affected. The financing of the trade is the vendor's concern and does not concern the purchasers: *Ashmore* v. *Cox & Co.* (3); *Blackburn Bobbin Co.* v. *Allen & Sons* (4). The parties plainly contemplated that a policy of insurance against war risks might not be procurable in America. Without that insurance the vendors could not sell the exchange. Can it be said that they contemplated a certain event but failed to contemplate its inevitable consequence?

Stuart Bevan K.C. in reply.

Cur. adv. vult.

November 20, 1919. Bankes L.J. read the following judgment:—This is an appeal from Bailhache J. The question which the learned judge had to decide was whether certain contracts for the sale of wheat had in the events which had happened been dissolved or whether they were still binding upon the appellants. The contracts are eight in number, by which the appellants sold to the respondents a large quantity of wheat. The contracts were dated June 23,

(1) [1917] 1 K. B. 222, 238.
(2) [1917] A. C. 495.
(3) [1899] 1 Q. B. 436.
(4) [1918] 2 K. B. 469.

and July 13, 14, 27, 28 and 30, 1914. The wheat was to be shipped during August and up to September 14, 1914, from an Atlantic and/or Canadian port or ports at sellers' option. The price was a price free on board including freight and insurance. The contracts also contained the following provisions :—[The Lord Justice read the clauses set out above.] The contracts also provided for arbitration in London under the Arbitration Rules of the London Corn Trade Association. On August 1 and 5 the appellants cabled the respondents tendering certain vessels to fulfil all the eight contracts, and they apparently shipped all the wheat upon those vessels. On the last-mentioned date they also cabled that it was impossible to insure the war risks, and that if no immediate remittance was made to New York they would cancel the contracts. On August 24 they cabled that they considered the contracts as at an end. The respondents thereupon claimed arbitration. The dispute was referred to two arbitrators and an umpire, who decided in favour of the present appellants. The present respondents appealed to the Appeal Committee who confirmed the award, subject to the statement of a special case. Bailhache J. on the hearing of the special case decided against the present appellants who now appeal to this Court.

The contentions of the appellants are set out in paragraph 25 of the special case. They may be reduced to two : (1) That within the meaning of the exception clause in the contracts they were prevented by hostilities from shipping any of the wheat. (2) That in the events which happened the contracts were dissolved, either because of the frustration of the adventure, or because of an implied term in the contracts to that effect. I think that the view taken by Bailhache J. with regard to the first point is the correct one. He held first of all that "shipment" referred to a putting of the goods on board, and not to the wider question of a fulfilment of a contract which consisted partly only of putting goods on board. In this, I think, he was right. He also held that the prevention referred to in the exception clause referred to a physical or legal prevention. In this

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also I think that he was right. I cannot usefully add anything to the reasons given by the learned judge for his decision on this part of the case.

The other contention of the appellants raises a more difficult question. Having regard to the facts of the present case I do not think that the question of the frustration of the adventure, and the question of whether the contracts contained an implied condition that they should in certain events be dissolved, need be considered separately. The present is a case in which it seems to me clear that the view taken by Lindley L.J. in *Turner* v. *Goldsmith* (1) and by Lord Sumner in *Bank Line* v. *Capel & Co.* (2) applies, namely, that the so-called doctrine of the frustration of an adventure rests on an implied condition in the contract between the parties. Lindley L.J., after referring to Blackburn J.'s observations in *Taylor* v. *Caldwell* (3), states the rule thus: "The substance of that is that the contract will be treated as subject to an implied condition that it is to be in force only so long as a certain state of things continues, in those cases only where the parties must have contemplated the continuing of that state of things as the foundation of what was to be done." In Lord Sumner's words (2): "The theory of dissolution of a contract by the frustration of its commercial object rests on an implication, which arises from the presumed common intention of the parties." If this is the correct view it follows that the question of whether the implication is to be made is a question of law for the Court and not a question of fact for the arbitrators to determine. The rules by which the Court must be guided are well established. In *Hamlyn & Co.* v. *Wood & Co.*(4) Lord Esher lays down the rule thus: "I have for a long time understood that rule to be that the Court has no right to imply in a written contract any such stipulation, unless, on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested

(1) [1891] 1 Q. B. 544, 550.

(2) [1919] A. C. 455.

(3) (1863) 3 B. & S. 826, 833.

(4) [1891] 2 Q. B. 488, 491.

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stipulation should exist. It is not enough to say that it would be a reasonable thing to make such an implication. It must be a necessary implication in the sense that I have mentioned." And Lord Watson in *Dahl* v. *Nelson* (1) indicates how the rule should be applied. He says: "I have always understood that, when the parties to a mercantile contract such as that of affreightment have not expressed their intentions in a particular event, but have left these to implication, a Court of law, in order to ascertain the implied meaning of the contract, must assume that the parties intended to stipulate for that which is fair and reasonable, having regard to their mutual interests and to the main objects of the contract. In some cases that assumption is the only test by which the meaning of the contract can be ascertained. There may be many possibilities within the contemplation of the contract of charterparty which were not actually present to the minds of the parties at the time of making it, and, when one or other of these possibilities becomes a fact, the meaning of the contract must be taken to be, not what the parties did intend (for they had neither thought nor intention regarding it), but that which the parties, as fair and reasonable men, would presumably have agreed upon if, having such possibility in view, they had made express provision as to their several rights and liabilities in the event of its occurrence." In the present case the Court is bound to consider the question in reference to the facts as found in the special case. The material facts as found by the Appeal Committee are as follows:—(1) That the business of exporting grain from America to Europe is based upon the sale of exchange in America, and it has long been a well-recognized usage or custom for shippers of grain from America to sell or negotiate the exchange to or with an exchange buyer in America. (2) That the buyers were aware of the above usage or custom at the time the contracts were made. (3) That in no circumstances would the banks in New York buy exchange on Rotterdam or Antwerp unless the goods

(1) (1881) 6 App. Cas. 38, 59.

shipped were insured against war risks. (4) That from August 1 to August 6, when the sellers claimed to cancel the contracts, no war insurance could have been effected by the sellers on the shipments. (5) That between the same dates both inclusive the sellers were unable to sell exchange on Antwerp or Rotterdam. (6) That the sale of goods provided for in the contracts in question could not be carried out unless a sale of exchange were possible. (7) That the impossibility of procuring war insurance or of selling the exchange was caused by hostilities.

As was pointed out by Bailhache J. in his judgment, the selling of exchange is a method by which the seller of goods secures payment for them as soon as they are put on board, instead of having to wait until the goods themselves, or the documents representing the goods, reach the buyer. Prima facie, therefore, the question is one which concerns the seller only. It is obvious that there may be many causes which prevent the selling of exchange, and in some cases these causes may be due to the default of the seller himself. If the special case was intended to set up a usage or custom that contracts should be cancelled, whatever the cause might be which prevented the selling of exchange, I should have no hesitation in saying that no term to that effect could be implied in any contract. I read the findings of the Committee of Appeal however as limiting the present case to a contention that the contracts would be dissolved if the selling of exchange was rendered impossible owing to hostilities. Reading the findings in that light it is to my mind all important to realize exactly what the findings are. The finding in paragraph 27 (1) as to the custom or usage on which the business of exporting grain is based has reference clearly to the export business in grain generally. The Committee find that the respondents had knowledge of this usage or custom at the time the contracts were made. There is a most material distinction between the impossibility of carrying on the huge export business in grain generally unless sales of exchange are possible, and the impossibility of carrying out particular contracts unless the seller can sell the exchange in respect of those particular contracts. A careful reading of the precise language used by the Committee in reference to this point in paragraph 27 (1), where they find that "the sale of goods provided for in the contracts in question could not be carried out unless such exchange were possible," has reference, I think, to sales of wheat generally, and the Committee appear to me to have advisedly stopped short of holding that the appellants could not have carried out these particular contracts, had they been so minded, even though they could not have sold the exchange. If this is the true state of the facts, what must one assume the parties would have said and done had the question of the possible breaking out of hostilities been discussed? The appellants would have said (as from the terms of the contracts it must be assumed that they did say): "You know the way in which the export business in grain from the United States is carried on, and the importance of being able to cover war risks in order to enable the exchange to be sold, and you must allow us to protect ourselves in that respect." The respondents would have said (and from the terms of the contracts it must be assumed that they did say): "Yes, we know all about that, and in the event of our not doing so you may cover the war risks at our expense if you wish to do so and are able to do so." Is any further agreement on the point to be assumed? Is it to be assumed that the appellants said to the respondents: "If we are not able to do so we shall not be able to fulfil our contracts, and you must agree to the contracts being dissolved if we cannot sell the exchange." I think not. The fact that the special stipulation in the contracts dealing with war risk insurance leaves it optional with the sellers whether to cover the war risk or not, and stops short of providing for what is to happen if neither party can effect a war risk insurance, is in itself significant, and looking at the facts as I understand them to have been found by the Committee I am of opinion that it cannot under the circumstances be assumed that either party to

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these contracts, and still less both parties, must have intended that in the event of the appellants being unable to sell the exchange the contracts would ipso facto be dissolved. I think, therefore, that the judgment of Bailhache J. was right, and the appeal must be dismissed with costs.

Had the Committee of Appeal found as a fact that the respondents knew at the time the contracts were entered into that the appellants could not carry them out if prevented by hostilities from selling the exchange, the question of whether the suggested implication should be made would have presented greater difficulty. As I have stated above I do not consider that they have so found.

It was contended for the appellants that the Committee of Appeal were entitled to find as a fact that the adventure was frustrated, and that as the Committee have so found the appellants are entitled to a decision in their favour. This argument was based upon the form of the question which was put to the jury in *Jackson* v. *Union Marine Insurance Co.* (1) and which was approved by Bramwell B. in the Exchequer Chamber. (2) In that particular case the putting of the particular form of question was no doubt a convenient way of ascertaining the facts which were material to be known. I cannot agree, however, with the conclusion which is sought to be derived from the way in which that case was tried. The question of whether the doctrine of "frustrated adventure" applies to any particular state of facts must, I consider, always be a question of law to be decided by the Court upon the facts. What amount of assistance the Court may require from a jury in order to ascertain the facts must depend upon the circumstances of each particular case. The fact that the Court in the case of *Jackson* v. *Union Marine Insurance Co.*(3) sought the assistance of the jury in the particular form adopted in that case does not in my opinion justify the inference which it is sought to draw from the approval of the form of question by the Exchequer Chamber.

(1) L. R. 8 C. P. 572.
(2) L. R. 10 C. P. 125, 141.
(3) L. R. 8 C. P. 572; 10 C. P. 125, 141.

Warrington L.J. read the following judgment:—The question in this case arises between buyers and sellers of American wheat. The buyers are merchants carrying on business in Antwerp. The sellers are merchants carrying on business in New York. On certain dates, the first of which was June 23, 1914, and the last July 30, 1914, eight contracts were made between the parties for the sale and purchase of a quantity of wheat to be shipped during August and not later than September 14, 1914. In the first contract the port of discharge was Rotterdam; in the others it was Antwerp. The price was f.o.b. including freight and insurance, and was to be paid net cash on presentation of bills of lading and/or delivery order. Provision was made for the furnishing by the sellers of policies of marine insurance not covering war risks, and the following clause was inserted immediately after that provision:—"In the event of war should sellers not have received from buyers approved English and/or American policies (if American, losses shall be payable in England) for approximate invoice amount covering war risk three days prior to shipment, sellers shall have the right, if they think fit, and are able, to cover war risk for account and risk of buyers." The contracts also contained the following clause: "In case of prohibition of export, force majeure, blockade, or hostilities preventing shipment, this contract or any unfulfilled part thereof shall be at an end."

The goods the subject of these contracts were all shipped by the sellers, but they were not consigned to the buyers, the sellers having on August 6 notified the buyers that they cancelled the contracts. They did so on the ground that they were unable to sell in New York exchange on Rotterdam or Antwerp, and were thus prevented by hostilities from making the shipments. The buyers insisted that they were entitled to have the goods delivered, and the matter went to arbitration under a clause in the contracts. It came eventually before the Appeal Committee of the London Corn Trade Association who stated their award in the form of a special case in favour of the sellers, with an alternative award in favour of the buyers in case the Court should be of opinion that their award in favour of the sellers was wrong. Bailhache J. has made an order to the effect that the alternative award is the correct one. The sellers appeal.

The appeal raises two questions. First, whether upon the true construction of the written contracts, and in the events which have happened, the shipment was prevented by hostilities so as to bring into operation the clause determining the contract. Secondly, whether the contracts are to be taken to be subject to an implied term or condition that if the sellers should be unable to sell the exchange in New York the contracts should be at an end.

As to the first question I agree with Bailhache J. in the opinion he has expressed in favour of the buyers and for the reasons he has given, and I see no necessity for adding anything on this point.

The second question is more difficult and requires careful consideration. The arbitrators found the following facts material to this point :—(1) The business of exporting grain from America to Europe is based upon the sale of exchange in America, and it has long been a well-recognized usage or custom for shippers of grain from America to sell or negotiate the exchange to or with an exchange buyer in America, and the sale of goods provided for in the contracts in question could not be carried out unless such exchange were possible. (2) The buyers were aware of the above usage or custom at the time the contracts were made. (3) The sellers shipped all the goods under the said contracts in accordance with their tenders. (4) From the 1st to the 6th August, 1914, inclusive, when the sellers claimed to cancel the contracts, they were unable to sell exchange on Antwerp or Rotterdam. (5) Such inability continued during the whole period of shipment provided by the said contracts. (6) From the 1st to the 6th August, 1914, inclusive no war insurance could have been effected by the sellers on the said shipments. (12) That the commercial purpose of the adventure, so far as the sellers were concerned, became frustrated by the impossibility in the circumstances prevailing of their being able to sell or negotiate exchange in America. They also added to the first of the above findings a statement that it was an implied term and/or condition of the contracts in question that the sellers should at all material times be able to sell or negotiate the exchange. This last statement is, in my opinion, an inference of law as to the proper legal result of the facts as found and is therefore open to review, and the learned judge has expressed a view to the contrary effect. The question whether such inference could properly be drawn is the very question left to the Court, and now to be decided by us. That the question whether the contract is subject to an implied term or condition putting an end to it in certain events, or providing that in certain events it shall have no operation, is a question of law is, I think, clear. The question is what is the legal effect of the existence of certain facts; just as it is for the Court to determine whether communications, written or verbal, constitute in law an express contract, so in my opinion is it with the question whether certain facts require the addition to a written contract of an implied term or condition. I think the authorities on the subject recognize this in that we find various tests suggested by reference to which judges are to determine whether such an implied term or condition exists or not.

We have then to determine whether on the facts found by the arbitrators the contracts were subject to an implied term that in a certain event the contracts should be at an end. The event suggested is the impossibility, for reasons not personal to the sellers, of selling or negotiating the exchange in America, i.e., of selling or negotiating in America bills drawn there on the buyers with bills of lading and insurance policies or certificates of insurance attached. What is said is that the whole business of exporting grain from America to Europe is based upon the sale of exchange in America, and that it has long been the recognized usage or custom for shippers to sell or negotiate the exchange accordingly, and that this usage or custom was known to the buyers and becomes "the basis of the contract in the

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mind and intention of the contracting parties": per Lord Shaw in *Horlock* v. *Beal* (1); so that the impossibility of putting it in practice in the particular case has the effect of determining the contract. In my opinion it does not follow that, because the export business depends on the sale of exchange, therefore the usage or custom relating thereto becomes the basis of the contract in the minds of both parties. The buyer has no concern with the mode in which the seller finances his business; under the express contract he buys the goods from the seller and is entitled to delivery thereof on payment of the purchase-money in cash. I think when it is said in the award that the business of exporting grain is based on the sale of exchange what is meant is that the exporters base their transactions as a whole on that footing, and could not otherwise carry on the business involving, as it no doubt does, the purchase in America of enormous quantities of grain requiring the supply of the necessary money without waiting for payment according to contract. It is true that the arbitrators find that the particular sales of goods could not be carried out unless such exchange were possible; but I think, comparing this finding with the finding that the sellers shipped the goods the subject of the particular sales, it must I think mean only that the particular sales as part of and in connection with the general export transactions of the sellers could not be carried out. Indeed the arbitrators themselves appear to have taken the same view, for they find, not that the commercial purpose of the adventure was frustrated as regards both parties, but only "so far as the sellers were concerned." These contracts if regarded by themselves could have been carried out, for the goods were actually shipped, though not delivered to the buyers. I think, therefore, that the contention that, as the result of the failure of something which is not the basis of the contract in the minds of both the contracting parties, the contract is at an end cannot be supported. As to the suggestion that the inference should be drawn from the

(1) [1916] 1 A. C. 486, 512.

presumed intention of the parties, see *The Moorcock* (1), I cannot say that each party must have intended that the contract should be subject to such a term or condition. The event which causes the difficulty is not war alone but may be any event not personal to the parties. Is the buyer to be presumed to agree to lose his right to grain he is ready to pay for because, owing to financial trouble in New York, the seller cannot sell there a bill for the price? Again, it might be that it would be to the interest of the seller to carry out a profitable contract even although he has been unable to sell the exchange; is he to be presumed to agree that the buyer may insist on the determination of the contract for a reason with which he has no concern? In the present case the impossibility of selling the exchange arose from the war and, as I gather, directly from the inability of the seller to obtain insurance against war risks. In such a case I agree with Bailhache J. that the clause already mentioned as to insurance against war risks is a guide, and I am bound to say in my opinion something more than a guide, in determining whether they had the intention we are asked to presume. The possibility of war was contemplated, a certain provision was made in that event, and it was recognized that the sellers might not be able to effect a war insurance. In the face of this clause I find great difficulty in presuming that the parties intended that the whole contract should be at an end if in the event of war the sellers should be unable to sell the exchange by reason of their inability to effect a war insurance.

On the whole I agree with the judgment of Bailhache J., and think that this appeal should be dismissed with costs.

Scrutton L.J. read the following judgment:—In this case I might content myself with saying that with one or two small exceptions I entirely agree with the very careful and closely reasoned judgment of Bailhache J., but as the case may go higher and is of considerable general importance I express my judgment in my own words.

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(1) (1889) 14 P. D. 64, 68.

The sellers, the appellants, had eight contracts with the buyers for the supply of wheat from the United States, one contract for Rotterdam and the remainder for Antwerp. Shipment was to be completed at periods between July 1 and September 15, 1914, no contract having an earlier date for completion than August 11. The price was "free on board including freight and insurance," which meant that the sellers had to find the ship and the policy. The policy was only to cover marine risks. Payment was in cash on presentation to buyers (i.e., in Belgium) of bill of lading. There was a provision about insurance of war risk to which I refer later. In shipments from the United States, where payment by the contract is on the other side of the Atlantic, it is very usual, almost universal, for the seller to obtain his money in advance of the contract time by "selling the exchange." I have stated the reasons of this practice, which is also common in the cotton trade, in *Guaranty Trust Company of New York* v. *Hannay & Co.* (1), and Bailhache J. has stated them in his judgment in this case. The only point on which I differ from Bailhache J. is that he treats selling the exchange as a matter arising after shipment and insurance, whereas I think it is generally provided for by contracts of sale, covers or credits effected beforehand by the seller. For instance, in the miscellaneous documents treated as evidence in this case by the arbitrators will be found statements, "Equitable Trust Co. to whom have sold our bills against contracts advised they could not accept bills for the present"—"International bankers will not accept bills in old engagements"—"American Express Company repudiate exchange contract"—"Banks here have refused honour exchange, although war risk covered and exchange sold them prior European hostilities."—"Banks refused accept exchange previously sold." The truth is the system is a way to finance a general selling business, not to render any one transaction possible. Any one transaction could be carried through without exchange, but the seller would be out of money for some time, and so hampered n subsequent operations. Its justification is the general volume of business, not the particular transaction. In this case the sellers had steamers chartered to carry the goods to Antwerp and Rotterdam. There is no finding whether the steamers refused to proceed to Antwerp or Rotterdam, and there are no materials for deciding whether, if they did refuse, they were in the right under their charters. We have had cases in these courts where shipowners have been held to be in the wrong in refusing to proceed to Dutch or Belgian ports for fear of hostilities. But it is proved and found that exchange houses in New York refused to buy exchange on these steamers, and that this inability continued from August 1 till the middle of September, the period of shipment covered by these contracts. There is also a finding that from August 1 to 6, when the sellers cancelled the contracts, no war risk insurance was procurable on these voyages, and this was at any rate one of the reasons why the purchase of exchange could not be effected. We are not told whether the sellers had any general contracts or covers for exchange, and if so whether their terms allowed the bankers or exchange houses to refuse documents in the events that happened. Anyhow the sellers did on August 6 cancel these contracts of sale, and sent the steamers with the goods on board to other destinations.

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(1) [1918] 2 K. B. 623, 659, 660.

Thereupon the matter went to the arbitration tribunal of the Corn Exchange who have decided against the buyers, but stated a special case. Anyone who compares the findings of fact in this case with those in the case which came before Sankey J.(1) will be struck by the way in which findings of commercial custom made by commercial arbitrators grow to meet difficulties raised in the Courts. The arbitrators who have decided in favour of the sellers have apparently rested their decision on three grounds which they treat as findings of fact. (1) That shipment was prevented by hostilities (finding 14). (2) That the sale of goods provided for in the contracts in question could not be carried out unless (sale of) exchange was possible, and it was an implied term of the

(1) *Bassano Zuccotti & Co.* v. *Carruthers*, not reported.

contracts that the sellers at all material times should be able to sell exchange (finding 1). (3) That the commercial purpose of the adventure, so far as the sellers were concerned, was frustrated by this impossibility (finding 12).

First, as to the prevention of shipment by hostilities, it is remarkable that the arbitrators, who find this as a fact, also find (finding 3) that the sellers shipped all the goods under their contracts in accordance with their tenders. They have obviously in my view put a very wide and erroneous meaning on the word "prevention." Economic unprofitableness is not "prevention," though a very high price for the article sold may be evidence of such a physical scarcity due to hostilities as amounts to prevention by hostilities. They have not considered whether the ships in which the contract goods were placed could physically go to the contract ports, but have rested themselves on the fact that the voyage might be financially unprofitable for the sellers, if they were not insured against war risk and financed from shipment till payment. I agree with the judge below that no facts are found which amount to prevention by hostilities in the true meaning of that term.

Secondly, there is a finding as to an implied term of the contract, that it shall be possible to sell exchange. It was argued that the question, what term was to be implied in the contract or whether the commercial purpose of the adventure was frustrated so that the contract was at an end (a question which again involves what contract on the subject was to be implied), was a question of fact, not of law, and that the decision of the arbitrators on the facts was conclusive. In my opinion the question what contract is to be implied, or whether a term in the contract is a condition precedent so that its untruth invalidates the contract, or is only a promise whose breach gives rise to a claim for damages, is a question of construction and law for the Court, though the circumstances under which the contract was made, which the Court is entitled to know in construing the contract, are facts to be found by the jury, and their importance to the commercial adventure may be a fact which assists the

Court materially in coming to a conclusion. This appears to be the view of the Exchequer Chamber in *Behn* v. *Burness*.(1) There the Court says (2): "A question however may arise, whether a descriptive statement in the written instrument is a mere representation, or whether it is a substantive part of the contract. This is a question of construction which the Court, and not the jury, must determine . . . . it was no part of the Judge's duty to leave to the jury any question as to the construction of the contract, or the materiality of any of its statements. It was his function to construe the contract with the aid of the surrounding circumstances found by the jury, and to decide for himself whether the statement . . . . was an essential part of the contract." The judgment continues by pointing out that the Court considering circumstances so found might then find a term of the contract to be a condition. In *Oppenheim* v. *Fraser* (3) Blackburn J. in the course of the argument says: "It is never a fact to go to the jury what the words of a contract mean, but it is a fact to go to them under what circumstances are they made, and to what do they relate"; and Lush J. gives the fanciful illustration that a judge, who might not otherwise construe the statement in a charter that a ship had a red figure-head as a condition precedent, might do so if the jury told him that her voyage was among pirates who for superstitious reasons never attacked a ship with a red figure-head. Exactly the same considerations seem to me to apply to the implication of a term which the parties have not expressed. The Court, and not the jury, are the tribunal to find such a term; they ought not to imply a term merely because it would be a reasonable term to include if the parties had thought about the matter, or because one party, if he had thought about the matter, would not have made the contract unless the term was included; it must be such a necessary term that both parties must have intended that it should be a term of the contract, and have only not

(1) 3 B. & S. 751.
(2) Ibid. 754, 756.
(3) 34 L. T. 524, 525.

expressed it because its necessity was so obvious that it was taken for granted. Lord Sumner in *Bank Line* v. *Capel & Co.*(1) says: "The theory of dissolution of a contract by the frustration of its commercial object rests on an implication, which arises from the presumed common intention of the parties . . . . This is a matter of construction." Again, "The Court can infer from the nature of the contract and the surrounding circumstances that a condition which is not expressed was a foundation on which the parties contracted," per Lord Loreburn in *Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.*(2) Being told the surrounding circumstances and any facts showing their importance, the Court must determine whether the parties must have intended that the contract should only continue in force if certain circumstances continued to exist, which the parties must have treated as essential to performance, or to the necessary common purpose of the parties in performance. I expressed my views fully on this subject in *Metropolitan Water Board* v. *Dick, Kerr & Co.* (3), and do not repeat them.

Now on the facts found by the arbitrators can the Court say that the parties to these contracts must both necessarily have intended that the power to sell exchange was a condition precedent to the continuance of the contract? It seems clear that inability to sell exchange from every cause is not included. The financial weakness or insolvency of the seller can hardly have been meant. Will financial panic in the New York market arising from over-speculation and calling in of loans and preventing exchange being sold put an end to the contract? Can either party insist on the contract being at an end, if exchange cannot be sold? Though the seller is strong enough to finance the particular contract without selling exchange, can the buyer refuse the goods if exchange cannot be sold? One of the counsel for the appellants thought he could; one thought he could not. How can the Court say that the parties to the contract must necessarily have agreed on such a term, and what is the exact wording and extent of the term on which they must have agreed? There is no doubt that, if war breaks out, failure to obtain war risk insurance may be important for both parties. The seller under such a contract usually takes the bill of lading to his own order to keep a proprietary hold on the goods till he is paid, or has a security for payment satisfactory to him; he, therefore, may want war risk insurance to cover his proprietary interest, as of course may the buyer. Now it is important to notice that the parties have thought of this, and have expressed certain terms about it. They have contemplated a war; they have provided that, if the buyer does not provide war risk insurance, the seller may insure, if he can, on buyer's account. But though they have contemplated inability to effect war risk insurance they have said nothing about the effect of that inability on the contract. This may be because they did not think about it; it may be because they could not agree what the effect should be; but why should the Court assume that there is a term which they must have contemplated, rather than a failure on their part to think about or agree on the matter? And if they have not expressed a term about the effect on the contract of inability to get war risk insurance, which they have mentioned, can the Court infer what they would have agreed about a matter they have not mentioned and a more remote result, failure to sell exchange because of failure to obtain war risk insurance? It seems to me one thing to say that the buyer knew that the seller usually made his financial arrangements in a particular way, and quite a different thing to say that the buyer agreed that the contract should be off if the seller could not make his usual financial arrangements. Many buyers arrange to get control of the goods before they pay for them by tendering a bank of first-class standing as acceptor of the documentary bills, but I think sellers would be astonished to hear that their contracts were at an end if their buyers could not make their usual financial arrangements.

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(1) [1919] A. C. 435, 455.
(2) [1916] 2 A. C. 397, 404.
(3) [1917] 2 K. B. 1.

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The power of implying terms which the parties have not expressed should be exercised by the Courts very sparingly and only in cases of necessity. In this case I agree with the judge below that there are no facts establishing the necessity of such an implication.

This view really involves the negative of the arbitrators' third ground of decision, commercial frustration of the adventure. This does not mean that it is unprofitable to one party to carry the adventure out in the events which have happened. It means that the contract implies and involves the continued existence of a state of subject-matter, of place, or of time, so that if such a state of things cease to exist the contract is impliedly at an end. The occurrence of war makes a difference to the performance of most contracts, but there is no general implication that contracts are at an end if any war affects their performance. The finding of the arbitrators in this case appears to me to carry the doctrine of commercial frustration further than it has ever been carried, or that it can legitimately be carried.

For these reasons, and for the reasons expressed in the judgment itself, which I entirely accept, I think the judgment of Bailhache J. should be affirmed and the appeal dismissed with costs here and below.

Appeal dismissed.

Solicitors for appellants: *Parker, Garrett & Co.*
Solicitors for respondents : *Henry Hilbery & Son.*

W. F. B.

[IN THE COURT OF APPEAL.]

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GAUNT v. BRITISH AND FOREIGN INSURANCE COMPANY, LIMITED AND STANDARD MARINE INSURANCE COMPANY, LIMITED.

[1918. G. 440.]

Insurance (Marine)—Insurance against all Risks—Exceptional Damage to Goods—"Casualty"—Bales of Wool damaged by Wet—Goods carried as Deck Cargo—Usage—Proof—Marine Insurance Act, 1906 (6 *Edw.* 7, *c.* 41), *s.* 55, *sub-s.* 2 (*a*) ; *s.* 78, *sub-s.* 4 ; *Sched. I.*, *r.* 17.

By policies of marine insurance relating to certain bales of wool and subscribed by the defendants which it was agreed had to be read with the cover notes which contained an essential term not in the policies the risk was described as "Including all risk of craft, fire, coasters, hulks, transhipment and inland carriage by land and/or water and all risks from sheep's back and/or station while awaiting shipment and/or forwarding and until safely delivered into warehouses in Europe with liberties as per bill of lading." The plaintiff had bought the wool from a company f.o.b. at a named foreign port and had taken an assignment of the policies. The company's wool came from two or three different places down to the port and was carried partly by land and partly by small local steamers. Some part of it was usually carried on deck. On arrival at the port of loading it was put into hulks until the ocean steamer could receive it. The wool arrived in England and no complaint was made in respect of it until it had been taken into the plaintiff's premises and about 140 bales of it had been used. It was then discovered that a considerable quantity of the bales were badly damaged by water, the wool being discoloured, tender and heated and still wet. The evidence showed that salt water must have reached the wool during transit on board the local steamers and probably as deck cargo and that the damage was quite exceptional and such as had never in a long experience been known to arise under the normal conditions of such a transit:—

Held, that there was evidence of a casualty, or something accidental, and of a danger which might or might not arise although the particular nature of the casualty was not ascertained, and that the underwriters were therefore liable.

Decision in *Schloss Bros.* v. *Stevens* [1906] 2 K. B. 665 on this point adopted.

Semble, that the rule that deck cargo was held covered if a usage to carry cargo of that description on deck were proved although unknown to the underwriter had not been altered by r. 17 of Sched. I. to the Marine Insurance Act, 1906.

Per Atkin L.J. Sect. 55, sub-s. 2 (*a*) of the Marine Insurance Act,

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1906, which provides that the insurer is not liable for any loss attributable to the wilful misconduct of the assured, but, unless the policy otherwise provides, he is liable for any loss proximately caused by a peril insured against, even though the loss would not have happened but for the misconduct or negligence of the master or crew, is not modified by s. 78, sub-s. 4, which provides that it is the duty of the assured and his agents, in all cases to take such measures as may be reasonable for the purpose of averting or minimising loss.

Decision of Rowlatt J. reversed.

APPEAL by the plaintiff from the judgment of Rowlatt J. in an action tried by him without a jury.

The action was brought by the plaintiff against the first-named defendants for a partial loss in respect of certain bales of wool under three policies of marine insurance dated respectively June 1, August 13, and August 13, 1917, subscribed by them, and against the second-named defendants for the same loss under two policies dated respectively April 30 and June 15, 1917, subscribed by them.

The plaintiff's claim against the first-named defendants was in respect of damage to the wool during the transit from the "sheep's back" to Punta Arenas, and, alternatively, against the second-named defendants in respect of damage to the wool during the transit from Punta Arenas to England. At the trial Rowlatt J. directed judgment to be entered for the second-named defendants and there was no appeal from that decision. The present appeal is therefore confined to the claim against the first-named defendants.

The following statement of facts is taken from the written judgment of Lord Sterndale M.R.: "The appellant had bought the wool in question partly from a company spoken of throughout the case as the Explotadora and partly from a Mr. Hirst who had bought from the same company. The terms of the purchase in each case from the Explotadora were f.o.b. Punta Arenas. The general course of business was as follows: The wool came from two or three different places down to that port and was carried partly by land and partly by small local steamers. It is sometimes stored in sheds until the local steamers can take it, and is then loaded either from moles or direct from the beach into them. Some part of it is usually carried on deck. On arrival at Punta Arenas it is put into hulks till the ocean steamer can receive it. At times there is too much wool to be taken in the sheds, and some part of it is stored outside. The Explotadora had for some time been in the habit of insuring their wool with the respondents, and the insurance had been generally in respect of the whole transit to England. In this case, as the wool has been sold f.o.b. Punta Arenas, the Explotadora only insured it as far as that port, leaving the ocean transit to be insured by the purchasers.

"The policies for the insurance have to be read with a cover note, to which each party appealed as containing an essential term not in the policy, and it was common ground that these terms must be read into them. The subject-matter was described as wool 'clips' in the cover note, and 'bales of wool' in the policies, and the risk was thus described: 'Including all risk of craft, fire, coasters, hulks, transhipment and inland carriage by land and/or water and all risks from the sheep's back and/or station, while awaiting shipment and/or forwarding and until safely delivered into warehouses in Europe with liberties as per bills of lading.' This clause also appeared in the policies and it may be enough to say that it was a warranty against consequences of war and hostilities. There was also a clause as to limitation to the following effect: '100,000*l.* (limit in any one place or in any one hulk or store 75,000*l.* Limit in any one ocean steamer, 150,000*l.*).' The wool arrived in England and no complaint was made in respect of it till after it had been taken into the appellant's premises at Bradford and about 140 bales had been used. It was then discovered that a considerable number of the bales were damaged by having been wetted and an examination was made by surveyors for the appellant and for the Standard Marine Insurance Co. who were the insurers of the ocean transit. Unfortunately, no surveyors were present on behalf of the respondents because no claim had been made upon them at that time. The learned judge has criticized this examination as more or less abortive and as cursory. On looking at the evidence and the report I think the examination was made in the ordinary way and is not open to the learned judge's criticism. The examination was made on behalf of the Standard Co. by representatives of Messrs. Jacomb Son & Co., described by the London Salvage Association as 'our usual wool experts.' One of them went down first and examined a portion, and then his superior went himself and examined a larger quantity and he reported to the Standard Co. in these terms: 'September 20, 1917. Acting under your instructions' (this is from Messrs. Jacomb Son & Co.), 'we instructed our Mr. P. E. Seaward to survey the above-mentioned wools, and he reports as follows: "On Friday, September 14, I was able to see about 500 bales, yesterday, September 19, I attended at Mr. W. C. Gaunt's Mill, Valley Combing Co., Canal Road, Bradford, where the defective wools are stored, and surveyed a further 1500 bales; being in all about 2000 bales out of the above 2162 bales; I was unable to see the balance as I was informed they had been sorted and put into manufacture. After a very careful examination I have to report that all the bales are more or less damaged by water and in my opinion sea water. Some of the bales are very badly damaged, the wool being discoloured, tender and heated and still wet. A large proportion of the bales have now dried, leaving the wool stained and tender. In some cases the wool in the bale is very slightly damaged but the bales show signs of water. How the damage occurred it is impossible to say; undoubtedly it is of long standing as the dryness of a large proportion of the bales testifies. I consider a fair and proper allowance (subject, of course, to the terms and conditions of the policies) is an all-round allowance of 25 per cent., and I am glad to say I was able to convince Mr. Gaunt to this effect and obtain his agreement. I would mention that I have no doubt that the few remaining bales I was unable to see were damaged to the same extent. I have Mr. Gaunt's assurance that they were in similar condition to the bales surveyed."' It is quite true that all the bales were not opened, but as this examination was made on the instructions of the London Salvage Association by their usual wool experts and apparently

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accepted by the Standard Co. as satisfactory I think it may be taken as sufficient. The result was that it was agreed that an all-round allowance of 25 per cent. was fair. The appellant at first asked for a considerably larger percentage.

"The appellant, who had taken an assignment of all the policies of insurance on this wool, brought an action against both the Standard Marine Insurance Co. and the respondents. On the trial evidence was given on behalf of the appellant and both defendants including that of witnesses examined on commission at Punta Arenas, and Rowlatt J. found that the damage to the wool was not caused by anything that occurred during the ocean transit and gave judgment for the Standard Co. on that ground. That decision was not questioned. He also found that it had been caused by water coming upon the outside of the bales and penetrating inwards and not from a wet condition of the wool when packed, and that it had been caused during the transit from the premises of the Explotadora to Punta Arenas. He found, however, that the appellant had not proved that it had occurred by reason of any of the perils insured against and therefore gave judgment for the respondents.

"I have already stated the way in which the wool was brought from the stations of the Explotadora to Punta Arenas and it is not necessary to do more than state shortly the evidence given as to the way in which the damage occurred.

"Witnesses, familiar with the way in which this business was carried on, were examined on commission but no evidence was produced tracing the transit of these particular bales or showing what had happened to them. It was stated that such evidence could not be obtained for two reasons: first, the difficulty of finding and securing the actual men who had worked, such difficulty being occasioned by the nature of the country in which the work was done; and, secondly, the fact that during the transit to Punta Arenas no record was kept of the exact marks and numbers of the bales which were being handled, and therefore these bales could not be distinguished from others. It was, however, proved that the

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and
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Marine
Insurance
Company,
Limited.

logs of the small steamers showed bad weather and rain at times, and that some bales shipped on them about this time were wet and also that some of these bales received on board the ocean steamers were stated in the mates' receipts and bills of lading to be wet and damaged. It was also proved that sometimes there was not room in the sheds for all the wool accumulated for shipment on the river steamers, and that some had to be piled outside the sheds, where tarpaulins were provided but not always effectively used. Evidence was also given that bales sometimes got wetted with salt water by an unexpectedly high tide while piled on the beach, and also by spray coming over them when carried on the deck of the river steamers. Evidence was given that part of the wool was always carried on deck. Great congestion prevailed at this time because of the difficulty in obtaining transport, with the result that the storage places were overcrowded and some of the wool had to be stored outside. Mr. Burbury, the manager of the Explotadora, stated that in his experience of the carriage of wool, extending over many years, he could not remember any case of a serious claim in respect of damage arising during the transit from the stations to Punta Arenas, and that the statements in the logs and mates' receipts indicated that something abnormal had happened. The chief officer of one of the ocean steamers also gave evidence that the part of these bales which he received was the worst cargo he had ever seen. I think, in considering whether this afforded evidence of a loss by the perils insured against, it is important to bear in mind what those perils were. The insurance was against 'all risks of craft, fire, coasters, hulks, transhipment and inland carriage by land and/or water, and all risks from the sheep's back and/or station while awaiting shipment and/or forwarding.' "

MacKinnon K.C. and *Harold Newell* for the appellant.

R. A. Wright K.C. and *G. R. Mitcheson* (*C. T. Le Quesne* with them) for the respondents.

The arguments sufficiently appear from the judgments.

The following authorities were referred to: *Schloss Bros.* v.

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Stevens (1); *Parkin* v. *Tunno* (2); *Sassoon & Co.* v. *Western Assurance Co.* (3); *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (4); *Paterson* v. *Harris* (5); *Cheshire & Co.* v. *Thompson* (6); *The Pomeranian* (7); *Jacob* v. *Gaviller* (8); *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society* (9); *Swan and Cleveland's Graving Dock & Slipway Co.* v. *Maritime Insurance Co.* (10); *May* v. *Lane* (11); *Torkington* v. *Magee* (12); *Sea Steamship Co.* v. *Price, Walker & Co.* (13); *Reid* v. *Standard Marine Assurance Co.* (14); *Laing* v. *Union Marine Insurance Co.* (15); *Montoya* v. *London Assurance Co.* (16); Arnould on Marine Insurance, 9th ed., pp. 238, 1609; Park on Marine Insurance (ed. 1842), p. 491; Stamp Act, 1891 (54 & 55 Vict., c. 39), s. 92, sub-s. 1.

Cur. adv. vult.

Dec. 12, 1919. LORD STERNDALE M.R. read the following judgment:—This is an appeal from a decision of Rowlatt J. in favour of the respondents in an action brought against them by the appellant upon three policies of insurance.

The question arises under the following circumstances. [His Lordship stated the facts and reviewed the evidence as above set out and continued:]

The cases relating to an insurance against all risks are not many, and I think that of *Schloss Bros.* v. *Stevens* (1) is the only one that throws much light on the matter. Both parties accepted the decision of the learned judge in that case that, in order to constitute a loss under the policy, the damage must have been caused by something accidental or in the nature of a casualty, and must not be the result of the ordinary handling of the goods under normal conditions existing at the time and place of transit. It has sometimes been expressed that the loss must be due to contingencies and dangers which may or may not occur, and not to such as must occur.

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(1) [1906] 2 K. B. 665.
(2) (1809) 2 Camp. 59, 62.
(3) [1912] A. C. 561.
(4) (1887) 12 App. Cas. 518.
(5) (1861) 30 L. J. (Q. B.) 354, 360.
(6) (1919) 24 Com. Cas. 198.
(7) [1895] P. 349.
(8) (1902) 7 Com. Cas. 116.
(9) [1918] A. C. 350.
(10) [1907] 1 K. B. 116.
(11) (1894) 64 L. J. (Q. B.) 236.
(12) [1902] 2 K. B. 427.
(13) (1903) 8 Com. Cas. 292.
(14) (1886) 2 Times L. R. 807.
(15) (1895) 1 Com. Cas. 11.
(16) (1851) 6 Ex. 451.

I think that where the evidence shows damage quite exceptional, and such as has never in a long experience been known to arise under the normal conditions of such a transit, there is evidence of the existence of a casualty, or something accidental, and of a danger or contingency which might or might not arise, although the particular nature of the casualty was not ascertained. I think such a state of things was proved by the evidence I have set out above, and therefore I cannot agree with the learned judge's finding that the plaintiff had not proved a loss within the perils insured against. It would, of course, have been competent to the insurers to rebut this prima facie case by proving that the loss occurred by something outside the insured perils, but no such evidence was given. I think he treated the policies too much as being against the specific perils in which it is necessary to prove specifically that the loss came within one of them, and did not give sufficient attention to the fact that these were policies of an unusual kind against all risks, and that it was sufficient to show that the loss was occasioned by a casualty or something accidental, without proving further in what the exact nature of that casualty consisted.

There are, however, several other points raised by the respondents with which I have to deal. First, it is argued that the policies cannot be assigned so as to enable the assignee to sue on them without joining the assignor. I think a sufficient answer to this point is that a policy is expressly made assignable by ss. 50 and 51 of the Marine Insurance Act, 1906.

The next point is that the respondents' liability is confined to damage at Punta Arenas, that such damage is not proved, and that the damage in England is the result of the appellants' own acts in shipping the wool and sending it on stowed in a confined space. The policies express the risk to be until delivered from the hulk at Punta Arenas to the ocean steamer. They therefore contemplate a delivery of the wool to the ocean steamer, and if the actual damage found is the necessary result of the damage up to that time I think the respondents are liable for it. If the appellant acted wrongly or negligently in sending forward the wool without reconditioning, or something of that sort, the case might be different.

The third point was that it was not shown whether this damage was due to rain or sea water, and that if by sea water it was occasioned while the wool was on the local steamers. In that case it was argued that it was not and could not be shown that the damage was not wholly or partly caused to the wool carried on deck and that, even if only so caused in part, it could not be shown how much was caused to deck and how much to under-deck cargo, and therefore no sum could be awarded in respect of damage to the under-deck cargo. This argument of course depends upon an assumption that the respondents are not liable for damage to deck cargo unless specifically insured. In support of this contention reliance was placed upon the general principle that deck cargo is not covered unless specifically mentioned and also upon r. 17 of Sched. I. to the Marine Insurance Act, 1906. I think the first point is met by the evidence that it was the regular practice, and had been for years, to carry these consignments of wool, or some part of them, on deck. The point arising under the Marine Insurance Act is different. The effect of the rule is that deck cargo is no part of the subject-matter of the insurance unless specifically insured, in the absence of any usage to the contrary. A question arises whether this rule has altered the law existing before the Marine Insurance Act. Before that Act deck cargo was held covered if a usage to carry cargo of that description on deck were proved, although such usage was unknown to the underwriter.

It was, however, contended that the law had been altered, and that it was now necessary to prove a usage of insuring such cargo without specifically describing it as deck cargo. This is the view expressed by the editors of the 9th edition of Arnould on Marine Insurance, and was forcibly pressed upon us by Mr. Mitcheson in his able argument. I doubt whether it was intended to make such an alteration in a well-known principle of marine insurance, but, whatever be the construction of the rule, I think the necessary proof of usage was given in this case. It was shown that it had been the practice to carry wool like this on deck for many years, and that the respondents had also, for many years, insured such wool without any specific mention of its being carried on deck, and I think such evidence is not rebutted by showing merely that the particular underwriter who effected this insurance was not informed of the practice. It may be noticed, though I do not think it necessary for the decision of this part of the case, that a director of the Explotadora, and member of the firm of their agents, Messrs. Duncan Fox & Co., was also a director of the respondent company.

Another point was raised on the limitation which I have mentioned, that is, 100,000*l.* limit in any one place or in any one hulk or store. There was at one of the stations, Puerto Prat, an amount exceeding in value the limit, partly in store and partly outside the store. The appellant contended that the limit was not exceeded because the part in the store and the part outside must be treated separately, and that neither part by itself exceeded the limit. I do not think this is right. I think the whole quantity at Puerto Prat was in one place and that the limit was exceeded. It was argued, though faintly, that the clause as to limitation was a warranty and that, as it was broken, the policy was avoided. I think this cannot be maintained, and that the result is that the claim in respect of the wool at Puerto Prat must be reduced proportionately.

It was also contended that the respondents were not liable for the damage to wool stored in the open because they were not told that it was so stored when an alteration was made in the limit, or at any time. The answer to this, in my opinion, is that if these facts afforded a defence in any way it would, in whatever form it is put in argument, be a defence on the ground of concealment of a material fact, and such defence is not pleaded and was not raised at the trial.

The last point with which I have to deal is the suggestion that if the wool was exposed to extra risk by reason of being stowed in the open, from congestion caused by want of transport, this was the consequence of the war and therefore came within the warranty against loss from all consequences of hostilities or warlike operations. I think this is not so and that such operations were not the proximate cause of the loss.

I think the appeal should be allowed, and judgment entered for the appellant with costs here and below. The amount must be ascertained by a reference, and on that reference it will be competent to the respondents to give evidence of any facts which show that the whole of the loss was not the natural consequence of the damage occasioned in transit to Punta Arenas.

ATKIN L.J. read the following judgment:—The learned judge has given judgment for the respondents on the ground that the appellant has not established a loss by perils insured against. By common consent the terms of the contract of insurance in this particular case are to be ascertained by reading the policy together with the cover note. It is thus found that the insurance is upon a named number of "bales of wool" valued at fixed sums "from sheep's back in the interior to Punta Arenas," against all risks from sheep's back until delivered from the hulk at Punta Arenas to the ocean steamer. I assume for the purposes of this case, in accordance with the admission of counsel, that all risks means all risks from fortuitous accidents or casualties. If the assured under such a policy proves a loss which may probably be caused by some fortuitous accident or casualty and may not be equally probably caused by any happening not a fortuitous accident or casualty, or otherwise not covered by the policy, he prima facie proves a loss within the policy. The defendant may, of course, displace the case of the plaintiff by proving the actual cause, and that the loss from such cause is not within the policy, for example, inherent vice, wilful misconduct of assured, or some other cause not of the character of an accident or casualty, or otherwise expressly or impliedly excluded from the policy. In the present case it appears to me that, subject to the question as to deck cargo, to which I propose to refer, the appellant by establishing loss by wetting, and proving that the loss occurred during the transit, established a prima facie case. I think that the facts show that the wetting might probably be caused by some fortuitous accident or casualty; and there is no other cause of a different character suggested as equally likely to produce, or even capable or producing, the loss other than wilful misconduct, the onus of proving which is certainly on the insurers, or loss when carried on deck. It is necessary to deal with the last suggestion. I think that the facts are consistent with some of the damage, at any rate, being caused while the wool, or part of it, was being carried on the decks of the local steamers; and if loss by such cause was not within the policy, the prima facie case disappears. There would then be evidence indicating a loss by a peril not covered equally probable as a loss by a peril covered; and though it is plain from the bills of lading that some damage was done to some wool before shipment on the local steamers, in the absence of identification of such wool, or the amount of such loss, I think the appellant would fail in his proof.

The question therefore arises whether damage incurred by the wool while carried on the deck of the local steamers was covered by the policy. For this purpose it is necessary to refer to the Marine Insurance Act, 1906. By s. 30, sub-s. 2, "Subject to the provisions of this Act, and unless the context of the policy otherwise requires, the terms and expressions mentioned in the First Schedule to this Act shall be construed as having the scope and meaning in that Schedule assigned to them." When reference is made to that schedule, it will be found that it departs from the scope assigned to it in the section in one or two instances. Rule 14, as to stranding, does not appear to be concerned with the scope or meaning of the word "stranded." So in r. 17, after a definition of "goods" we find this sentence: "In the absence of any usage to the contrary, deck cargo and living animals must be insured specifically, and not under the general denomination of goods." I think that this must be read as enacting, not that the general description "goods" does not include deck cargo, but that the subject-matter of the insurance, however described, will not be covered while carried on deck unless it is specifically insured as deck cargo. In the former view, the rule would not apply in the present instance, for the subject-matter of the insurance is particularised as "wool," and not given the general denomination of "goods." In the latter view, however, the rule does apply, "unless the context of the policy otherwise requires" (s. 30). The effect of the rule is, I think, not to remove from the perils insured against, the perils incident to carriage on deck, but to remove from the scope of the policy so much of the described subject-matter as is carried on deck. It does not limit the perils, but limits the subject-matter of insurance. I think therefore that the fact that the insurance is against "all risks" is not inconsistent with the full operation of the rule, and that therefore the context does not require the exclusion of the rule.

It remains to consider whether the appellant proved the existence of "any usage to the contrary." The meaning of these words is not plain. Before the passing of the Marine Insurance Act, 1906, I think it was well established that the rule that an ordinary marine policy did not cover deck cargo did not apply where it was proved that there was a usage of trade to carry on deck the particular class of goods on the particular transit, even though the particular underwriter did not in fact know of the existence of the usage: *Apollinaris Co.* v. *Nord Deutsche Insurance Co.* (1) where the ignorance of the usage by the underwriter is one of the facts stated. I am inclined to think that the Act of 1906 did not intend to alter the law, and that a "usage to the contrary" means a usage to carry on deck goods of the class described on the insured voyage, that being a usage which at the time of the passing of the Act negatived the operation of the general rule which is being enacted in the Act. But it must be admitted that, construing the words without reference to the then state of the law, the more natural meaning seems

(1) [1904] 1 K. B. 252.

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to be: deck cargo must be insured specifically, unless there is a usage that it need not be insured specifically, which makes the usage a usage in the business of marine insurance rather than a usage in the business of marine transport. This seems to be the view of the learned editors of the editions of Arnould on Marine Insurance, published after the Act of 1906. As I have said, I do not think that the Legislature meant to alter the law by introducing such a refined distinction into a well-known commercial transaction. But in this case, in either view of the meaning of the Act, it appears to me that the plaintiff established the necessary usage. The evidence clearly shows that the practice of conveying wool on the deck of the local steamers had existed for many years, and was well known. The fact that the local bills of lading expressly excluded the ship's liability for deck cargo as between ship owner and shipper, so far from being inconsistent with the existence of the usage, rather points to deck cargo being contemplated. There was also evidence that this class of goods had been insured for many years with the respondents, in policies which did not specifically mention deck cargo. I think that the respondents must be deemed to have taken the risk of the deck cargo covered under the well-known usage, even though their particular underwriter stated that he did not know of it. Under these circumstances I think that the true inference is that the usage referred to in r. 17 was established, and that a loss from wetting, occasioned while the wool, or part of it, was carried on deck, was within the policy. It follows that the appellants' prima facie proof of loss by perils insured against was established, and in the absence of evidence by the respondents rebutting it, the appellant is entitled to judgment.

There is one further point to which it is necessary to refer. It was contended by the respondents that the appellant was under an obligation to take reasonable care that the goods should not be damaged by an insured peril, and that, so far as the damage was caused by the negligence of the appellant or his servants in protecting the goods from wet, whether rain or sea water, he could not recover. I think two answers can be given to this. In the first place it appears to me that the insurers are liable for loss caused by the negligence of the assured or his servants unless the acts complained of amount to wilful misconduct of the assured (s. 55, sub-s. 2 (*a*)). In the second place, in any such case the onus would be on the insurer to establish such cause of loss, and such onus was not discharged. I do not think that the provisions of s. 78, sub-s. 4, modify the provisions of s. 55 as is suggested as a possible view by the learned editors of the 9th ed. of Arnould on Marine Insurance, s. 799 *a*. I think that the only effect of that sub-section is to impose a duty to sue and labour—a very restricted duty compared with the general obligations contended for. In any case, what I have said as to the onus of proof applies to a breach of this obligation. I do not deal with the other parts of the case, upon which I entirely agree with the view of the facts and the law taken by the Master of the Rolls. I agree with the order pronounced by him.

EVE J. read the following judgment :—I have very little to add to what has already been said by my Lords. It is incontestable that the wool arrived in Punta Arenas in a seriously damaged condition and there is no evidence before us to show that this damage was accentuated during the ocean transit. No case, therefore, has so far been laid for the defence founded on an obligation on the part of the assured to recondition the wool before shipment. Further, in my opinion, the true conclusion to be drawn from the evidence is that the damage occasioned prior to shipment at Punta Arenas was due to the action of salt water—a conclusion which excludes from consideration suggestions as to inherent vice in the wool when packed, negligent land transport from the stations to the coast, and improper storage or insufficient protection against rainfall there or in the hulks where it was placed pending transfer to the ocean steamer.

From this it results that the salt water must have reached the wool either by an abnormally high tide before shipment on the local steamers or during transit on board those steamers, and probably as deck cargo. As no evidence was given of any abnormally high tide having occurred, there only remains the latter of these alternatives to explain the damage.

The question is, Does the insurance cover this risk ? The answer involves the consideration of two points, the one whether damage to cargo on board the local steamer by shipment of salt water was caused by a casualty within the meaning of the decision in *Schloss Bros.* v. *Stevens* (1), and the other whether in the absence of specific mention the deck cargo was included in the policy.

If my view of the proper conclusion to be drawn from the evidence as to the immediate cause of the damage is right, I think there was clearly a casualty within the decision I have referred to, but if the particular nature of the contingency out of which the damage arose is on the evidence left indeterminate, I agree with the other members of the Court that there was produced on behalf of the appellant evidence from which it is legitimate to infer the existence of such an accident or casualty.

On the more difficult question whether the " usage to the contrary " mentioned in r. 17 of Sched. I. of the Marine Insurance Act, 1906, relates to a general usage of trade to carry the particular goods on deck or to a general usage not to insure specifically the goods so carried, I prefer to express no opinion inasmuch as I agree with the other members of the Court that, whichever of the two be the usage to be established, the assured has in this case established it.

The appeal in my opinion succeeds, and should be allowed in the terms already pronounced by the Master of the Rolls.

Appeal allowed.

Solicitors for appellant : *Ballantyne, Clifford & Co.*
Solicitors for respondents : *Waltons & Co.*

(1) [1906] 2 K. B. 665.

W. I. C.

[IN THE COURT OF APPEAL.]

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1920
Jan. 23.

MOORE *v.* FLANAGAN AND WIFE.

[1918. M. 1465].

Husband and Wife—Goods Supplied on Order of Wife—Action against Husband and Wife Jointly—Leave by Master to Sign Judgment under Order XIV., *r.*1, *against Both—Judgment against Husband set aside—Leave to defend—No Joint Liability—Principal and Agent—Election.*

The plaintiff, who was a milliner and dressmaker, brought an action by a specially indorsed writ against a husband and wife claiming against them jointly to recover the price of goods supplied to the wife. Upon an application under Order XIV., r. 1, for leave to sign final judgment against both husband and wife for the amount claimed, the Master gave leave, and the plaintiff signed judgment against both. The husband alone appealed. The judge in chambers set aside the judgment against the husband and gave him leave to defend. At the trial the judge found that there was no joint liability in the husband and wife, that the goods being prima facie necessaries for the wife the husband prima facie was the principal and the wife the agent, and he held that the plaintiff had not, by the judgment against the wife, elected to treat her as principal, and was entitled to recover against the husband.

Held, that as the remedy was an alternative one, the plaintiff, having signed judgment against the agent, could not afterwards recover judgment against the principal in respect of the same debt, and that, therefore, the husband was not liable.

APPEAL from the judgment of Lush J. at the trial of the action without a jury.

The plaintiff, who was a milliner and dressmaker, brought an action against the defendants, who were husband and wife, the writ being specially indorsed under Order III., r. 6, with a claim for "147*l.* 12*s.* for the balance of the price of goods sold and delivered." The writ was at first issued against the wife alone, but a few days afterwards the husband was joined as a defendant. The goods were millinery and clothing, and were supplied to the wife in 1916. The plaintiff applied for leave to sign final judgment under Order XIV., r. 1, against both defendants, and the affidavit made on her behalf in support of the application stated that the defendants "are justly and truly indebted to the above-named plaintiff in the sum of 147*l*. 12*s*. for goods supplied." The wife did not file any affidavit in opposition to the application, but the husband made an affidavit in which he denied that he was indebted to the plaintiff, and stated that from the indorsement on the writ of summons it appeared that the goods, which he believed were exclusively articles of personal adornment, were supplied to his wife on her personal credit, and that "at the date the goods were alleged to have been supplied I was a lieutenant in the R.N.V.R., and my salary and allowance did not at any time exceed 275*l*. per annum, and I had no private income whatsoever, as is well known to the plaintiff who in the first instance sued my wife separately." The Master gave leave to sign final judgment against both defendants, and judgment was signed accordingly, that against the wife being in the form applicable to a married woman. The husband appealed, but the wife did not appeal. The judge in chambers set aside the judgment against the husband and gave him leave to defend, and ordered that the action should be entered for trial in the short cause list. The judgment against the wife proved fruitless.

At the trial no evidence was called for the defendant. Lush J. said that, prima facie, the goods came within the description of necessaries for the wife and, prima facie, the husband was liable as the principal, and the wife was not liable. There was not, in his view of the facts, a joint liability in the husband and wife. That being so, if the plaintiff had sued the wife to judgment that would be an election to treat the wife as principal, and the plaintiff could not afterwards sue the husband. But in this case the plaintiff had made no such election. She sued both husband and wife, and obtained judgment under Order XIV. against both. The fact that the wife did not appeal, and that the husband appealed and succeeded in getting the judgment against him set aside, leaving the judgment against the wife standing, could not turn the plaintiff into a contractor who had elected. The acquiescence of the wife in the judgment against her could not affect the plaintiff's rights and make her an elector. The plaintiff could not compel the wife to appeal. In his opinion *Morel* v. *Earl Westmorland* (1) was distinguishable, and the plaintiff was entitled to judgment. He accordingly gave judgment for the plaintiff for the amount claimed.

The husband appealed.

Randolph K.C. and *du Parcq* for the husband. The learned judge found that there was no joint liability, but gave judgment for the plaintiff on the ground that she had never elected to treat the wife as principal. That is contrary to the rule laid down in *Morel* v. *Earl Westmorland* (1), where Collins M.R. said (2): "The plaintiffs having obtained judgment against the Countess on the footing that she was severally liable as the principal, cannot now turn round and say that she was an agent for the purpose of imposing liability upon her husband as the principal." Lord Halsbury L.C. stated the same rule (3): "The plaintiffs might have sued either the agent or the principal. . . . The result was that the plaintiffs got judgment against the agent. They cannot get judgment against the principal also. It is an alternative remedy." The same principle is stated in *French* v. *Howie* (4) by Jelf J., whose judgment was approved by the Court of Appeal. (5) In *Cross & Co.* v. *Matthews* (6) an attempt was made to get over the difficulty by having the judgment, which had been signed against the agent in default of appearance, set aside, but the Court held that there had been a conclusive election to accept the liability of the agent, and the attempt failed. The defendant, therefore, is entitled to judgment. [They also referred to *McLeod* v. *Power* (7) Order XIII., r. 4; and Order XXVII., r. 3.]

[SCRUTTON L.J. referred to *Hammond* v. *Schofield*. (8)]

Charles K.C. and *W. Valentine Ball* for the plaintiff. A person to be an elector must make a final and conclusive election or do some unequivocal act which shows an election. In *Morel* v. *Earl Westmorland* (1) the plaintiffs, by deliberately

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(1) [1903] 1 K. B. 64; [1904] A. C. 11.

(2) [1903] 1 K. B. 76.

(3) [1904] A. C. 14.

(4) [1905] 2 K. B. 580.

(5) [1906] 2 K. B. 674.

(6) (1904) 91 L. T. 500.

(7) [1898] 2 Ch. 295.

(8) [1891] 1 Q. B. 453, 457.

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signing judgment against the wife alone, had made a conclusive election. They had done an unequivocal act showing an intention to elect to look to the wife for payment. As Lord Davey said (1): "By signing judgment against one they" (the plaintiffs) "have, on the principle of *Scarf* v. *Jardine* (2), elected to take their remedy against that one." In the present case the plaintiff signed judgment against both defendants on the footing of a joint liability, and not against the wife alone. That is the vital distinction between the present case and *Morel's Case.* (3) It would be an extraordinary result if the wife, by refusing to appeal with her husband, could make the plaintiff an elector to look to the wife alone, and thus free the husband from liability. The plaintiff had no control over the wife and could not compel her to appeal. Election must come from the plaintiff. She has not done any unequivocal act of election; she has never deliberately elected to take her remedy against the wife alone. As Lord Blackburn said in *Scarf* v. *Jardine* (4), speaking of election: "Now, on that question, there are a great many cases; they are collected in the notes to *Dumpor's Case* (5), and they are uniform in this respect, that where a man has an option to choose one or other of two inconsistent things, when once he has made his election it cannot be retracted, it is final and cannot be altered." No final and conclusive election has been made in this case.

No reply was called for.

BANKES L.J. This appeal raises a question of some importance. The action was brought by a specially indorsed writ against husband and wife claiming against them jointly to recover the price of goods supplied by the plaintiff to the wife. An application was made under Order XIV., r. 1, for leave to sign final judgment against both defendants, and the Master gave leave to sign judgment against both and judgment was so signed accordingly. The husband appealed, and the judge varied the order by setting aside the judgment against him, and gave him leave to defend, and ordered the action to be put into the short cause list for trial. The judgment against the wife, who had not appealed, remained standing. When the cause came on for trial counsel for the husband took the point that, unless there was a joint liability in husband and wife, no judgment could be given against the husband, because judgment had been signed against the wife; that, as the true position was that the wife ordered the goods as the agent ot the husband, the plaintiff could not recover against both principal and agent in respect of the same debt, and that therefore the judgment against the wife was a bar to the recovery of judgment against the husband. The learned judge came to the conclusion that the husband and wife were not jointly liable for the goods, but that the action having been brought on the footing of a joint liability, the plaintiff never had the opportunity of electing as between husband and wife, and that, therefore, she never did elect to sue the wife alone. The learned judge thought that *Morel* v. *Earl Westmorland* (1) was distinguishable, and he gave judgment for the plaintiff for the amount claimed, In my opinion the present case is concluded by *Morel's Case.* (1) In that case the action was brought against husband and wife jointly, and an application was made under Order XIV., r. 1, for leave to sign final judgment for the amount claimed against both as on a joint liability. The Master gave the plaintiff leave to sign judgment against the wife and judgment was signed against her, and he gave the husband unconditional leave to defend. The only distinction between the two cases is that in *Morel's Case* (1) it may possibly be said that the plaintiff might have said to the Master: "No, I will not accept an order agianst the wife alone," whereas in the present case the plaintiff did not have that opportunity. Does that constitute any real distinction between the two cases? Taking the judgments in the Court of Appeal and in the House of Lords in *Morel's Case* (1) they seem to me to rest upon this principle. If a person has a claim against

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(1) [1904] A. C. 15.

(2) (1882) 7 App. Cas. 345.

(3) [1903] 1 K. B. 64; [1904] A. C. 11.

(4) 7 App. Cas. 360.

(5) 1 Sm. L. C., 8th ed., 47, 54; 12th ed. 35 40, 41.

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two other persons, one of whom is in fact an agent for the other, and judgment is signed against the one who turns out to be the agent, that is a conclusive bar to an action against the principal. I find that principle stated by Collins M.R. in *Morel's Case* (1), where, after coming to the conclusion that there was no evidence of a joint liability, he said that he would look at the case on the footing of a several or alternative liability, and proceeded: "The plaintiffs, having obtained judgment against the Countess on the footing that she was severally liable as the principal, cannot now turn round and say that she was an agent for the purpose of imposing liability upon her husband as the principal. In this point of view the liability of the husband and wife is not joint, but the liability of one is inconsistent with the liability of the other. . . . The plaintiffs cannot recover against both. . . . The result of the whole case is that the judgment against the husband cannot be sustained on the basis of the liability being joint; and, if it be sought to sustain it on the ground that the action must be treated as if brought in respect of a several liability of one or other of the defendants alternatively, then, judgment having been signed against the wife on the footing that she was liable for the price of the goods as a principal, the plaintiffs cannot afterwards obtain judgment for the same amount against the husband on the footing that the wife was his agent in ordering the goods." Applying that principle, and even accepting the contention of the plaintiff's counsel that the only judgment knowingly signed was against both husband and wife as joint contractors, still the plaintiffs, having recovered judgment against the wife, cannot also recover judgment against the husband as principal. In *Morel's Case* in the House of Lords (2) Lord Halsbury L.C. stated the same principle: "The plaintiffs might have sued either the agent or the principal. I prefer keeping to those terms because it gets rid of the confusion which arises from the peculiar relation of these parties to each other. The result was that the plaintiffs got judgment against the agent. They cannot get judgment against the

(1) [1903] 1 K. B. 76.

(2) [1904] A. C. 14.

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principal also. It is an alternative remedy; it cannot be made available against the two." Lord Halsbury was there dealing with the facts as they appeared at the trial, and the Court must look at the position of the parties as then proved. It is true that Lord Davey treated the case as one in which election was material, but he said (1): "But if the proof which they" (the plaintiffs) "tendered at the trial shows, not a joint debt by the two, but an alternative claim against one or the other, then I think that by signing judgment against one they have, on the principle of *Scarf* v. *Jardine* (2), elected to take their remedy against that one, and cannot afterwards sue the other who is not jointly but alternatively liable." It is to be noticed that that language was used in answer to an argument that the plaintiffs never elected to release or abandon the claim against the husband, the very argument advanced in the present case. I am constrained to say that the case is covered by *Morel's Case* (3), and the appeal must be allowed.

Scrutton L.J. I do not profess to say that I feel quite satisfied in having to allow this appeal. I feel that the rule is extremely technical. But we sit here to administer, and not to make or amend, the law, and I have no option but to give judgment for the appellant.

Before Order xiv. it is clear that at common law, in the case of a joint contract, judgment against one joint contractor was a bar to an action against the other. The reason for the rule was probably not founded on election. I am disposed to agree with Vaughan Williams J. in *Hammond* v. *Schofield* (4), where he said: "The basis of this defence is not the election or unconscious election, if there can be such a thing, of the plaintiff, but the right of the co-contractor when sued in a second action on the same contract to insist, though not a party to the first action, on the rule that there shall not be more than one judgment on one entire contract." Another

(1) [1904] A. C. 15.
(2) 7 App. Cas. 345.
(3) [1903] 1 K. B. 64; [1904] A. C. 11.
(4) [1891] 1 Q. B. 457.

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technical way of putting it is to say that the contract is merged in the judgment, and therefore the cause of action on the contract is gone. A more substantial way of putting the matter is that each joint contractor has a right to have his co-contractors joined as parties so as to have them all before the Court. The law upon the point was laid down in *King* v. *Hoare*(1) and other cases, and finally by the House of Lords in *Kendall* v. *Hamilton.* (2) So also in the case of an alternative remedy, as in the case of principal and agent, the plaintiff cannot after recovering judgment against the agent proceed against the principal. Here again the technical ground may be merger of the contract in the judgment. In that state of the law amendments in procedure were introduced by Order XIV., and the question at once arose as to what should be done when one defendant was dealt with summarily and the other at the trial. The rules provided for some cases but not for all. By r. 5 where one defendant has a good defence and any other defendant has not and ought not to be permitted to defend, the former may be permitted to defend, and the plaintiff shall be entitled to enter final judgment against the latter. See also Order XIII., r. 4, and Order XXVII., r. 3. The House of Lords decided in *Morel* v. *Earl Westmorland* (3) that r. 5 of Order XIV. is limited to joint contractors, and does not apply where the right of action is in the alternative against one or other of two defendants. That case also decides that the fact that the plaintiff has taken judgment under that rule against one on the mistaken footing of a joint liability will not assist him if it turns out that the liability was alternative. In that case the plaintiffs signed judgment against the wife under Order XIV. on the footing of a joint liability and the husband was given leave to defend, but at the trial a joint liability was not proved, the wife being merely the agent of the husband, and it was held that the plaintiff could not recover judgment against the principal. The only possible distinction between that case and the present is that put by Mr. Charles, namely, that in *Morel's Case* (1) judgment under Order XIV. was signed against the wife alone, whereas in this case judgment was taken against both husband and wife, and therefore the plaintiff could not be said to have made an election between them. But to my mind that is not a sufficient distinction. The true legal position of the parties in the present case is this: The plaintiff applied under Order XIV. for judgment against both husband and wife. She succeeded before the Master. The husband appealed, and when the appeal came on for hearing the judge, who knew that the judgment against the wife remained standing, set aside the judgment against the husband, and gave him leave to defend. The application before the judge was in reality a continuation of the application before the Master, and it was open to the plaintiff to say: "I will not take that order; I ask for an adjournment to enable me to serve notice on the wife to appear on this appeal when the whole matter can be gone into." The plaintiff did not do so, and must be deemed to have deliberately taken judgment under Order XIV. against the wife alone. The matter is very technical, but in these circumstances the law says that the plaintiff cannot subsequently recover against the husband. Upon these grounds I think that the appeal must be allowed.

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(1) (1844) 13 M. & W. 494.
(2) (1879) 4 App. Cas. 504.
(3) [1904] A. C. 11.

ATKIN L.J. I agree. I cannot say that I feel any misgiving as to the justice of our decision. Any ill result to the plaintiff arises from her abuse of the procedure under Order XIV. The plaintiff issued a specially indorsed writ which on its face showed a joint claim against husband and wife. She then applied for leave to sign final judgment against both as on a joint liability, and made an affidavit that the defendants were jointly indebted. In spite of the husband's affidavit she induced the Master to give leave to sign judgment against both. Upon appeal by the husband the judge set aside the judgment against him and gave him leave to defend. When the case came on for trial it was found that there was

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no joint liability in the defendants, and the plaintiff then turned round and said that the husband alone was liable. That offends against the rule, which is founded on good sense, that a plaintiff cannot sue an agent to judgment and then sue the principal. Having recovered judgment against the agent he cannot sue the principal. This depends, not on election, but on the construction of the contract. By the terms of the contract the plaintiff is prevented, owing to something she has done, from recovering judgment against the husband. Election is a separate principle which at a stage short of judgment may bar the remedy which a person may otherwise have against the principal. That is the law as laid down in *Morel* v. *Earl Westmorland.* (1) The material facts and documents I have verified from the appendix to the case lodged in the proceedings in the House of Lords. They are the same as in the present case. The action was against the husband and wife on a similar writ, indorsed with a similar claim, and the Master gave leave to sign final judgment against the wife, but gave the husband leave to defend. Both the Court of Appeal and the House of Lords held that, as there was no joint liability, the judgment recovered against the wife must be treated as recovered against her as principal, and the plaintiff could not then sue the husband as principal. Order XIV., r. 5, protects the plaintiff in the case of joint contractors, but not where the liability is in the alternative.

Appeal allowed.

Solicitors for plaintiff: *Hutchinson, Sons & Gomm.*
Solicitors for defendant: *Orr, Dignam & Co.*

(1) [1903] 1 K. B. 64; [1904] A. C. 11.

W. F. B.

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